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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

Court, U.S.
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No. 93-

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

POLITICAL CONTRIBUTIONS DATA, INC., RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is inconsistent with *Pierce v. Underwood*, 487 U.S. 552 (1988), to require district courts to find that the government's position was not "substantially justified," and thus to award attorney fees against the government under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), whenever a federal agency's construction of a statute it administers has been rejected under deferential judicial review.

2. Whether *Pierce v. Underwood*, 487 U.S. 552 (1988), requires courts of appeals to use a deferential abuse-of-discretion standard when reviewing a district court's finding that the government's position was "substantially justified," which precludes an award of attorney fees under the Equal Access to Justice Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Federal Election Commission v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), and suggests that the Court summarily reverse that judgment.

OPINIONS BELOW

The June 17, 1993, decision, as amended June 30 and July 9, 1993, of a panel of the court of appeals reversing the district court's judgment is reported at 995 F.2d 383 (2d Cir. 1993), and appears at Appendix ("App.") A (1a-13a) of the Commission's separately bound volume of appendices. The July 30,

1992, memorandum opinion of the United States District Court for the Southern District of New York denying Political Contributions Data, Inc. ("PCD"), attorneys' fees and other costs under the Equal Access to Justice Act is reported at 807 F. Supp. 311 (S.D. N.Y. 1992), and appears at App. B (14a-35a).

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1993. The Commission's timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on August 3, 1993 (App. C). On October 26, 1993, Justice Thomas granted an extension of time until December 31, 1993, for the Commission to file a petition for certiorari (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

For the Court's convenience, the full text of section 2412 is set out at App. G (92a-97a), and the statutory and regulatory provisions at issue in the civil

enforcement action underlying this attorneys' fees dispute are set out at App. H (98a-99a).

STATEMENT OF THE CASE

A. The Equal Access to Justice Act

Congress enacted the Equal Access to Justice Act ("EAJA" or "the Act"), 28 U.S.C. § 2412(d), "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, . . . and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325 (1980). *See also*, H.R. Rep. No. 99-120, 99th Cong., 1st Sess., Part I, at 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132-33. EAJA does not authorize automatic fee-shifting to accomplish this goal, however. Instead, it provides for an award only if the party prevailing in a nontort civil action against the United States meets specified qualifications, *see* 28 U.S.C. § 2412 (d)(2)(B), and the court determines, *inter alia*, that the "position of the United States" was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A).

Although EAJA does not define the term "substantially justified," this Court has construed it to mean " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The question is "not what the law now is, but what the Government was substantially justified in believing it to have been" at the time the government adopted its position on the legal issues. 487 U.S. at 561. A district court's finding of substantial justification under EAJA is reviewable only under a "def-

erential, abuse-of-discretion" standard of review. *Pierce*, 487 U.S. at 560.

B. The Underlying Litigation on the Merits

In the underlying civil law enforcement suit, brought pursuant to 2 U.S.C. § 437g(a)(6), the Commission alleged that PCD, a for-profit corporation, had violated 2 U.S.C. § 438(a)(4), a provision of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. §§ 431-455. Section 438(a)(4) directs the Commission to make all campaign finance reports and statements required to be filed by political committees available for public inspection and copying. It also provides, however, that "any information" about individual contributors copied from such documents "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes. . . ." *See also* 11 C.F.R. § 104.15. The Commission contended that PCD had violated section 438(a)(4)'s "commercial purposes" prohibition by conducting a commercial business consisting entirely of the marketing and sale of lists of individual contributors, including their name, city, state, zip code, and occupation or principal place of business, which PCD had copied from FEC computer tapes of information from political committees' reports. (App. 42a-44a.)[1]

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[1] Prior to this lawsuit, the Commission had issued an advisory opinion at the request of PCD's parent company, Public Data Access, Inc. Relying upon the regulation implementing section 438(a)(4), 11 C.F.R. § 104.15, the Commission in that advisory opinion concluded that the company's proposal to market lists of contributors copied from reports filed with the Commission would be a use for "commercial pur-

The district court found that PCD had violated the FECA. *See FEC v. PCD*, 753 F. Supp. 1122 (S.D. N.Y. 1990), *reprinted in* App. E (39a-73a). The court found it proper for the Commission "to rely on PCD's for-profit status as an indication of its commercial purpose" (App. 52a), and found reasonable the Commission's conclusion that PCD's bare lists of contributors were not within the exemption for "newspapers, magazines, books or other similar communications" the Commission had established by regulation, 11 C.F.R. § 104.15(c). (App. 58a-59a.) The court also rejected PCD's argument that the restriction in section 438(a)(4) violates the First Amendment, concluding that the provision serves two important governmental interests: protecting the property rights of the owners of contributor lists from being undermined by unauthorized and uncompensated commercial use, and minimizing the discouraging effect of public disclosure on the willingness of private individual contributors to help finance the electoral speech of candidates and political committees they support. (App. 62a-73a.) The court therefore granted summary judgment for the Commission.

The Second Circuit reversed, adopting a narrow interpretation of section 438(a)(4) that excluded PCD's activities from the provision's coverage. *See FEC v. PCD*, 943 F.2d 190 (2d Cir. 1991), *reprinted in* App. F (74a-91a). Characterizing the provision as "skeletal" (App. 84a), the court agreed that Congress had left a "gap" for the Commission to fill " 'in determining what commercial activities fall within

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poses" in violation of section 438(a)(4). *FEC Advisory Opinion 1986-25*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5865 (Aug. 15, 1986).

the proviso's prohibition' " (App. 84a) (*quoting National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986)). The court concluded that "reference to the plain language of" section 438(a)(4) was "insufficient" to resolve the case, and therefore found it necessary to "move outside the four corners of the statute . . . in order to construe it" (*id.*). The court sought "guidance" in the Commission's implementing regulation, its advisory opinion interpreting that regulation, and the statute's legislative history (App. 85a-91a). The court also found it necessary to construe "the statute in a manner that avoids the first amendment problems" (App. 76a).

The court construed the "commercial purposes" provision to apply only to the use of contributor lists for soliciting. The court acknowledged that the Commission's construction of the statute, and of its own regulation, was entitled to deference, but found that the Commission's construction was not "a 'reasonable interpretation' of either its own regulation or § 438(a)(4)" (App. 87a). Because PCD's contributor lists did not include street addresses and contained a *pro forma* warning against using the lists for solicitation or commercial purposes, the court found that the lists were highly unlikely to be useful for solicitation (App. 89a). In these circumstances, the court decided, the lists should be treated as communications similar to the newspapers and magazines exempted by the Commission's regulation (App. 88a).

This construction, the court stated (App. 87a), would fully implement the purposes of the FECA's disclosure provision, while protecting "to the extent

possible" individual contributors' interest in personal privacy, which was the only statutory purpose of the "commercial purposes" restriction in section 438 (a)(4) that was recognized by the court (App. 87a, 88a, 90a-91a). In thus construing the statute as narrowly as possible, the court ignored the other major purpose of the provision found by the district court, namely, protection of a political committee's property interests in its contributor lists, and also refused to defer to the Commission's reconciliation of the competing purposes served by the statute.

C. The Litigation Over Attorneys' Fees

After prevailing on appeal at the merits stage, PCD filed an application for attorneys' fees and other litigation expenses under EAJA with the district court. The district court denied the application, finding that the Commission's position on the merits had been "substantially justified" within the meaning of 28 U.S.C. § 2412(d)(1)(A). (App. 15a, 23a-34a.)[2] Citing *Pierce v. Underwood*, 487 U.S. at 565, the court found that "the position adopted and pursued by the FEC had a 'reasonable basis both in law and fact' as 'could satisfy a reasonable person'" (App. 28a).

In making this determination, the court reviewed the state of the law "[a]t the time the FEC brought suit against PCD for selling lists of contributor data" (App. 24a). The court emphasized that at that time "there was little congressional or judicial

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[2] As an alternative ground for denial, the court also found that PCD's application was untimely (App. 19a-22a). The court of appeals reversed that determination and the Commission does not seek further review of that issue.

guidance concerning" the scope of the ambiguous language of section 438(a)(4), which "promoted competing interests" that the Commission was "forced to reconcile" (App. 24a, 29a). Although the court of appeals later rejected the Commission's weighing of these competing interests, the district court found the Commission's position "substantially justified" primarily because "there was never any indication prior to this litigation that the FEC's interpretation [of section 438(a)(4)] was unreasonable" (App. 29a).

In making this determination, the district court took into consideration the reasoning of the court of appeals on the merits (App. 30a-34a). However, because "Congress did not intend 28 U.S.C. § 2412 (d)(1)(A) to be an automatic fee-shifting device," the court rejected PCD's contention that the merits decision controlled the EAJA determination (App. 28a):

> [I]t is a well-established rule that a court defers to an agency's [statutory] interpretation unless it finds it to be "unreasonable." *See Chevron U.S.A. Inc. v. Nat[ural] Resources Defense Council, Inc.*, 467 U.S. [837], 844 (1984). Thus, using PCD's analysis, any decision overruling an agency's interpretation would automatically result in the Government paying attorneys' fees and expenses to the other party . . . . Accordingly, this Court may not terminate its inquiry with the Court of Appeals' conclusion that the FEC's interpretation was "unreasonable," but rather, the Court must examine the legal basis for the FEC's interpretation . . . .

In a divided decision, the Second Circuit reversed the district court's denial of the EAJA application.

The majority explicitly rejected application of the abuse-of-discretion standard of review in this case: "[W]e have no occasion to assess the merits of the district court's exercise of discretion" (App. 9a). Instead, because the merits decision had concluded that the Commission had failed to provide a "reasonable interpretation" of the relevant law, the court majority held that the merits decision "conclusively established that the Commission's position was not justified so as to bar an award of attorney's fees" under EAJA. (App. 9a.) Thus, the majority concluded that "the legal standards which governed the merits phase of this litigation are precisely those to be applied to the EAJA question" (App. 8a). The majority acknowledged that this view conflicts with the views of a number of other courts of appeals. (App. 8a.)

Judge Jacobs dissented because he did not "believe that the district court abused its discretion in finding that the Commission was substantially justified in pursuing its position on the merits" (App. 10a).

> The Commission lost its claim on the merits—in the only way it *could* lose on the merits of that claim—upon a finding that it adopted an *unreasonable* interpretation of the "commercial purposes" provision of 2 U.S.C. § 438(a)(4) (1988) and its corresponding regulation . . . . [But] [t]he EAJA reasonableness question is . . . considered from a different point of view: "not what the law now is, but what the Government was substantially justified in believing it to have been." [*Pierce v. Underwood*, 487 U.S.] at 561. Whether the Commission was substantially justified is a "historical" question. *Id.*

(App. 10a-11a.) Observing that the court's obligation was to review the district court's EAJA opinion, Judge Jacobs found that "[n]othing in the 1991 [merits] opinion requires that we now reverse the district court's ruling on the distinct, historical issue of substantial justification" (App. 11a).

> Appellant's sale of donor lists for profit was not a "commercial purpose" under § 438(a)(4), as the 1991 panel held, but that result was not a foregone conclusion. The 1991 opinion found that § 438(a)(4) was made "skeletal" in order to permit the Commission to define the "commercial purposes" prohibition; that "we must . . . seek further guidance outside the FECA itself"; and that "the best guidance" is provided by legislative history. 943 F.2d at 194-98. A holding of unreasonableness at the merits stage, however sound, is not necessarily a predictable result, especially where it turns in large part (as here) on legislative history.

(App. 11a-12a.) Pointing out that this Court had already ruled in *Pierce* that a district court's finding of substantial justification under EAJA is subject only to deferential review, Judge Jacobs found that "the district court's findings easily withstand review for abuse of discretion" (App. 12a-13a).

> [T]he district court's carefully considered opinion held that the Commission was substantially justified *ex ante* in pursuing a position that the district court upheld on summary judgment, but that this Court, by way of a different analysis, held to be unreasonable. The district court has given detailed consideration to several factors, including the clarity of governing law at the

> time the Commission acted; the foreseeable length and complexity of the litigation; and the consistency of the Commission's position.

(App. 12a.) Finally, Judge Jacobs pointed out how the majority opinion had effectively rejected this Court's view of both the standard of review and the "substantial justification" inquiry (App. 13a):

> To the extent the majority expands the 1991 reasonableness analysis to resolve the EAJA issue, the majority is engaging in *de novo* review. To the extent the majority relies on the 1991 opinion's outcome, the majority treats EAJA as a fee-shifting statute.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals effectively adopted a *per se* rule that, as the district court explained (see p. 8, *supra*), would transform EAJA into an automatic fee-shifting device whenever the government loses a case on the merits because its interpretation of a statute or regulation it administers is not accepted by a court applying the usual deferential standard of review established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This decision directly contradicts this Court's construction of EAJA in *Pierce v. Underwood*, 487 U.S. 552 (1988), and conflicts with the holdings of a majority of the other circuits. Cases litigated under this deferential standard are ubiquitous, and in no sense the "unusual situation" postulated by the majority below (App. 9a). Automatic attorneys' fee awards in this large class of cases would be an unnecessary and unjustifiable drain on the federal treasury. Moreover, the

threat of automatic fee-shifting would be a deterrent to the government in pursuing cases of first impression or adopting a plausible construction of a statute that serves the public interest but might present a risk of judicial rejection under the usual deferential standard of review. None of this was intended by Congress when it enacted EAJA as a limited waiver of sovereign immunity. This decision presents a direct conflict among the circuits on an issue of substantial importance, which warrants plenary review by this Court.

As we explain below, the court of appeals failed to follow this Court's holdings in *Pierce* in two fundamental ways. First, the court effectively adopted a *per se* rule that a merits decision rejecting the government's construction of a statute as unreasonable under deferential review binds the district court to conclude that the government's position was not "substantially justified" under EAJA. Second, the court refused to review the district court's substantial justification determination under the deferential abuse-of-discretion standard that this Court found to be required under EAJA. Because the court of appeals so plainly refused to follow this Court's unequivocal rulings on these issues in *Pierce v. Underwood*, we suggest that summary reversal is appropriate in this case.

I. THE COURT OF APPEALS FAILED TO FOLLOW THE STANDARD ADOPTED BY THIS COURT FOR DETERMINING WHETHER THE GOVERNMENT'S POSITION IS "SUBSTANTIALLY JUSTIFIED" UNDER EAJA

This Court has held that to be "substantially justified" within the meaning of EAJA, the government's position need not be " 'justified to a high degree,' "

but only "to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. at 565 (citation omitted). "[A] position can be justified even though it is not correct, and . . . it can be substantially (*i.e.* for the most part) justified if a reasonable person could think it correct," *id.* at 566 n.2. Since "[a]t the attorneys' fees stage it will always be the case that the government's position has been rejected," *Trahan v. Brady*, 907 F.2d 1215, 1218 (D.C. Cir. 1990), the mere "[f]ailure to prevail does not raise a presumption of lack of substantial justification" and "[t]he government need not . . . 'show that it had a substantial likelihood of prevailing.'" *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1230, 1231 n.4 (9th Cir. 1990) (*quoting United States v. First Nat'l Bank of Circle*, 732 F.2d 1444, 1447 (9th Cir. 1984)). *Accord, e.g., United States v. One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992); *Keasler v. United States*, 766 F.2d 1227, 1231 (8th Cir. 1985). This Court has noted that this standard permits an award of attorneys' fees only "in a very small category of cases," *Pierce*, 487 U.S. at 574.

In *Pierce*, 487 U.S. at 560-61, the Court explained that even in cases in which the merits involve only a pure question of law, the substantial justification issue under EAJA "will not be precisely the same as the merits: not what the law now is, but what the Government was substantially justified in believing it to have been." This EAJA determination is a question "of entirely historical interest," 487 U.S. at 561, in which the court is to analyze "the government's position looking prospectively from the time the government took this position, without the ad-

vantage of [the court's] subsequent pronouncement on the actual meaning of the law." *Trahan v. Brady*, 907 F.2d at 1219.[3]

The court of appeals in this case rejected application of the historical test for substantial justification adopted in *Pierce*, holding instead that, because the agency's statutory interpretation had been rejected on the merits under a standard of review requiring deference to a reasonable agency construction, "the legal standards which governed the merits phase of this litigation are precisely those to be applied to the EAJA question" (App. 8a). The court concluded that this determination by the merits panel controls the substantial justification issue under EAJA, so that the district court was precluded from engaging in the historical inquiry required by *Pierce* and its progeny. (App. 9a.)

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[3] Contrary to the apparent view of the court below (App. 9a), this inquiry is not altered when First Amendment issues are raised. Even in cases where the government's position was actually found to be unconstitutional, the courts have not awarded attorneys' fees under EAJA unless the government's position on the merits was not substantially justified. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1230-1231 (9th Cir. 1990); *Grace v. Burger*, 763 F.2d 457, 458-59 (D.C. Cir.), *cert. denied*, 474 U.S. 1026 (1985). In this case, however, the district court explicitly upheld the constitutionality of the Commission's construction of 2 U.S.C. § 438 (a) (4) (App. 62a-73a), and the court of appeals declined to reach the constitutional issues because of its narrow construction of the statute (App. 77a, 91a). Moreover, the D.C. Circuit has since upheld the constitutionality of section 438(a) (4), adopting one of the constitutional arguments that the Commission also advanced, but without success, at the merits stage of this litigation. *FEC v. International Funding Institute, Inc.*, 969 F.2d 1110 (D.C. Cir.) (*en banc*), *cert. denied*, 113 S.Ct. 635 (1992).

The adoption of a *per se* rule requiring EAJA awards whenever the government loses a case because its statutory construction is found unreasonable under deferential judicial review cannot be reconciled with this Court's decision in *Pierce*. To the contrary, the Court there found that "the question whether the Government's litigating position has been 'substantially justified' is . . . a multifarious and novel question, little susceptible, for the time being at least, of useful generalization" and refused " 'either to fix or sanction narrow guidelines for the district courts to follow.' " 487 U.S. at 562 (*quoting Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10-11 (1980)). Moreover, the Court reached that conclusion in a case that itself involved judicial rejection, under the deferential standard of review, of the government's interpretation of a statute it administers. The government had settled the underlying lawsuit only after "every court to hear the merits (nine District Courts and two Courts of Appeals) rejected the Government's position." 487 U.S. at 569. The appellate court's decision on the EAJA application had opined that "the decision of the District of Columbia court on the merits . . . establishes that the Secretary had no reasonable basis in law." *Underwood v. Pierce*, 761 F.2d 1342, 1346 (9th Cir. 1985) (citing *Underwood v. Hills*, 414 F. Supp. 526, 531 (D.D.C. 1976), and the conclusion in *Dubose v. Pierce*, 579 F. Supp. 937, 950 (D. Conn. 1984),[4] that

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[4] The Second Circuit vacated the district court's judgment, 761 F.2d 913 (2d Cir. 1985), and this Court then vacated the Second Circuit's judgment in light of *Pierce v. Underwood*. See 487 U.S. 1229 (1988). On remand, the court of appeals affirmed the district court. 857 F.2d 889 (2d Cir.), *cert. denied*, 490 U.S. 1007 (1989).

the Secretary's position was "unreasonable" and "had no justifiable basis"). Other courts had also "flatly and unequivocally rejected" the government's construction of the statute, *Abrams v. Hills*, 547 F.2d 1062, 1067 (9th Cir. 1976), *judgment vacated in light of settlement*, 455 U.S. 1010 (1982), finding the government's position "unreasonable," *Dubose v. Hills*, 405 F. Supp. 1277, 1292 (D. Conn. 1975), and its interpretation not entitled to deference because it was "not 'consistent with the congressional purpose' . . . [and] there are ' "compelling indications that it is wrong." ' " *Ross v. Community Services, Inc.*, 405 F. Supp. 831, 835 (D. Md. 1975) (citations omitted), *aff'd mem.* 544 F.2d 514 (4th Cir. 1976), *judgment vacated in light of settlement*, 455 U.S. 1010 (1982).

On this record, the Court refused to adopt the very *per se* test adopted by the appellate court in this case.

> Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely it could take a position that is substantially justified, yet lose.

Pierce, 487 U.S. at 569. The Court concluded that even the uniform "string of losses" in eleven courts that the government had suffered in *Pierce* was not "enough to decide the present case," and that it still was necessary to review "the actual merits of the Government's litigating position." *Id.*

The rule adopted by the court below also directly conflicts, as the court acknowledged (App. 8a), with the law of most of the other circuits, which have held

that even a decision on the merits finding the government's position unreasonable or arbitrary and capricious does not foreclose a finding at the EAJA stage that the government was substantially justified. In the Fifth Circuit, for example, a merits decision that "determined that [agency regulations] amounted to an unreasonable interpretation of the statute," was found not to be "conclusive on the substantial justification question, else in this class of case the substantial justification issue would always simply merge with the decision on the merits." *Griffon v. United States Dep't of Health and Human Services*, 832 F.2d 51, 52 (5th Cir. 1987). The Fifth Circuit recently reversed a district court's EAJA award that was based solely upon the rejection of the government's construction of the statute on the merits, finding that the district court thereby "misapprehended the governing legal standards," *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3254 (U.S. No. 93-471, Sept. 20, 1993). The Ninth Circuit has also specifically rejected the position accepted by the court below that "the deference given to an agency's interpretation of its organic statute under *Chevron* . . . demonstrates that a court's finding that an agency has acted contrary to law implicitly indicates that its action was unreasonable" for EAJA purposes. *Kali v. Bowen*, 854 F.2d 329, 333 (9th Cir. 1988).[5]

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[5] The court majority below relied (App. 7a, 8a) upon *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (9th Cir. 1992). As shown in the text, however, the Ninth Circuit explicitly rejected the *per se* rule adopted below in the *Kali* decision, and the *Oregon* court relied upon *Kali*. *Oregon*, 980 F.2d at 1332. Unlike the court below, the *Oregon* court did not hold that the EAJA decision is controlled by a

In sum, the other circuits have concluded, in conflict with the decision below, that "[s]uch a *per se* rule is inappropriate under the *Pierce* regime." *Trahan v. Brady*, 907 F.2d at 1220. Instead, because the "substantially justified" question under EAJA is governed by a standard "that is separate and distinct from whatever legal standards governed the merits phase of the case," at "the EAJA stage, the court is not wedded to the underlying judgment on the merits in assessing either the Government's litigation position or its underlying conduct." *FEC v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986).[6]

II. THE COURT OF APPEALS REFUSED TO APPLY THE ABUSE-OF-DISCRETION STANDARD OF REVIEW ADOPTED BY THIS COURT

"In *Pierce* [*v. Underwood*, 487 U.S. 552 (1988)], the Court held a District Court's determination under the Equal Access to Justice Act . . . that 'the position

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merits determination that the government's position was unreasonable, but only that the merits court's conclusion that the statutory language and legislative history were clear and unequivocal could not be rejected by the district court at the EAJA stage. 980 F.2d at 1332. Of course, the failure of the court below to follow the construction of EAJA in *Pierce v. Underwood* would not be justified even if the *Oregon* court had made the same mistake.

[6] *See also, e.g., Sierra Club v. Secretary of Army*, 820 F.2d 513, 517 (1st Cir. 1987); *United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir.), *cert. denied sub nom. Crandon v. United States*, 113 S.Ct. 73 (1992); *Abernathy v. Clarke*, 857 F.2d 237, 238 (4th Cir. 1988); *Welter v. Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991); *Pottgieser v. Kizer*, 906 F.2d 1319, 1323, 1324 (9th Cir. 1990); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 466-67 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988).

of the United States was substantially justified' should be reviewed for an abuse of discretion." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990). This standard is not limited to factual aspects of the substantial justification determination; "*Pierce* also concluded that [a] district court's rulings on legal issues should be reviewed deferentially." *Id.* The courts of appeals, other than the majority below, have agreed that "the unqualified directive of *Pierce* to review EAJA decisions for abuse of discretion" requires an appellate court to review a district court's "denial of EAJA fees and its determination that the government's position was substantially justified under the 'abuse of discretion' standard." *Trahan v. Brady*, 907 F.2d 1215, 1217 (D.C. Cir. 1990). *Accord, e.g., United States v. One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992); *Young v. Sullivan*, 972 F.2d 830, 835 (7th Cir. 1992); *Forest Conservation Council v. Devlin*, 994 F.2d 709, 711 (9th Cir. 1993).

Despite this Court's plain directive, however, the majority below explicitly disavowed that standard of review, stating that "we have no occasion to assess the merits of the district court's exercise of discretion" (App. 9a). Such explicit rejection of the standard of review mandated by this Court cannot be permitted to stand.

III. THE DISTRICT COURT'S FINDING THAT THE COMMISSION'S POSITION ON THE MERITS WAS SUBSTANTIALLY JUSTIFIED UNDER EAJA WAS NOT AN ABUSE OF DISCRETION

The district court carefully applied the analysis of EAJA in *Pierce v. Underwood*, 487 U.S. at 563-571, and determined that under that standard the

Commission's position on the merits was "substantially justified" (App. 23a). The district court's decision was based on a detailed historical inquiry into the facts and circumstances under which the Commission adopted the position that the court of appeals later held to be incorrect (App. 23a-26a, 28a-31a, 33a-34a). The majority opinion below did not dispute any of these findings, and Judge Jacobs affirmatively found that "the district court's findings easily withstand review for abuse of discretion" (App. 13a).

The district court explained that "[a]t the time the FEC brought suit against PCD for selling lists of contributor data, in violation of 2 U.S.C. § 438(a)(4), there was little congressional or judicial guidance concerning the relevant statutory provisions" (App. 24a). The "congressional enactments promoted competing interests" (*id.*), and "the legislative history supplied the FEC with few guidelines" for interpreting section 438(a)(4) (App. 25a). Moreover, the one judicial precedent on point had explicitly found the statute and legislative history ambiguous; that court offered no substantive interpretation of the provision, but "instead found that Congress, in enacting 2 U.S.C. § 438(a)(4), had ' "left a gap for the [FEC] to fill" in determining what commercial activities fall within the proviso's prohibition' " (App. 25a) (*quoting National Republican Congressional Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986)). The Commission, therefore, "was forced to reconcile" conflicting statutory goals "in the absence of any contrary, or even clear, guidance from either Congress or the courts" (App. 29a). "Given the conflict between FECA's terms, the lack of congressional and judicial guidance, the ambiguous gap which the FEC was required to fill, and that the legislative his-

tory only established a 'newspaper exception,' not an exception encompassing 'similar communications,' this Court finds that the FEC's position had a reasonable basis in law and was 'substantially justified.' " (App. 30a.) (Footnote omitted.)

The district court's findings were entirely reasonable. It has long been recognized that the fact that a case presented an issue of first impression on the merits weighs heavily in the government's favor under EAJA.[7] The district court's initial ruling on the merits in the Commission's favor, while not controlling, is another recognized factor supporting a finding of substantial justification.[8]

The district court also explicitly took into account the court of appeals' decision on the merits. Although, as noted *supra*, p. 8, the district court found that the merits decision was not controlling on the EAJA issue, the court examined the reasoning of the merits decision closely. It noted (App. 24a) that the court of appeals itself had "recognized the tension between" the specific restrictions in section 438(a)(4) and the FECA's more general interest in disclosure, and had found the "plain meaning" rule insufficient to resolve the problem of interpreting sec-

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[7] *See, e.g., De Allende v. Baker*, 891 F.2d 7, 13 (1st Cir. 1989); *Mattson v. Bowen*, 824 F.2d 655, 657 (8th Cir. 1987); *Grace v. Burger*, 763 F.2d at 459; *Boudin v. Thomas*, 732 F.2d 1107, 1116 (2d Cir. 1984); *Spencer v. NLRB*, 712 F.2d 539, 559 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

[8] *See, e.g., Sierra Club v. Secretary of the Army*, 820 F.2d 513, 519 (1st Cir. 1987); *Battles Farm v. Pierce*, 806 F.2d 1098, 1104 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1046 (1987); *Porter v. Heckler*, 780 F.2d 920, 922 (11th Cir. 1986).

tion 438(a)(4). (App. 24a-25a.)[9] The district court concluded that the Commission's attempt to balance these goals was not unreasonable simply because the court of appeals later "placed greater emphasis on the importance of public disclosure than the FEC had" (App. 30a). As Judge Jacobs pointed out, the merits panel's holding that PCD's "sale of donor lists for profit was not a 'commercial purpose' under § 438(a)(4) . . . was not a foregone conclusion." (App. 11a.)[10]

Indeed, the novelty and complexity of the issues of policy, statutory interpretation, and constitutionality involved in applying 2 U.S.C. § 438(a)(4) are demonstrated by the D.C. Circuit's unanimous *en banc* decision in *FEC v. International Funding Institute*, 969 F.2d 1110 (D.C. Cir.), *cert. denied*, 113 S.Ct. 635 (1992). The D.C. Circuit in that case

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[9] The erroneous statement in the majority opinion below (App. 9a) that the merits court found the Commission's interpretation "unreasonable in light of the plain language . . . of the statute" is inexplicable, for Judge Jacobs expressly noted that "[t]he 1991 opinion found that § 438(a)(4) cannot be literally applied" (App. 11a).

[10] The Commission could not anticipate that the court of appeals would insist upon strictly subordinating the restrictions set out in section 438(a)(4) when they conflict with the statute's broader disclosure goals despite this Court's view that "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). Nor could the Commission predict that the court of appeals would restrict application of section 438(a)(4) to the examples given in the legislative history, since this Court "has never required that every permissible application of a statute be expressly referred to in its legislative history," *Moskal v. United States*, 111 S.Ct. 461, 467 (1990).

rejected a First Amendment challenge to section 438 (a)(4), relying on a statutory purpose that the Second Circuit had refused to take into consideration in construing the provision.

In narrowly construing section 438(a)(4)'s prohibitory language, the Second Circuit focused exclusively on one goal explicitly mentioned in the provision's scant legislative history, that of protecting the privacy of contributors. The court studiously ignored the district court's finding that section 438 (a)(4) serves a second significant governmental interest—protecting the property rights of political committees who invest substantial resources in developing the contributor lists they are required to submit for public disclosure (App. 56a, 58a). In contrast, the D.C. Circuit agreed with the Commission that, "as can be seen from the face of the statute, § 438(a)(4) protects a political committee against losing the economic value of its contributor list merely because it must publicly disclose the list." 969 F.2d at 1116. The D.C. Circuit also found this separate statutory purpose sufficiently important to withstand a First Amendment challenge. In fact, the D.C. Circuit found that careful protection of political committees' property interest in their solicitation lists actually promotes, rather than undermines, First Amendment values, 969 F.2d at 1116-1117, and a concurring opinion cautioned that if the statute did not adequately protect the property interests of political committees, the disclosure requirement of the FECA might itself be in constitutional jeopardy as "a taking under the Fifth Amendment." 969 F.2d at 1121 (Randolph, J., concurring). In these circumstances, the D.C. Circuit found it unnecessary even to address the interest in protecting contributors from harass-

ment, the only statutory purpose given any credence in the Second Circuit's construction of section 438 (a)(4).

The conflicting analyses of the Second Circuit and the D.C. Circuit dramatize the ambiguity of the role of section 438(a)(4) in this complex statutory scheme and the sophisticated considerations involved in construing the provision. The district court in the present case properly took these complexities into account in determining that the Commission's position was "substantially justified" under EAJA, and Judge Jacobs properly applied the standard of review mandated by the Court in concluding that the district court's thoughtful decision was not an abuse of discretion.

CONCLUSION

For the reasons set out above, the Court should grant the Federal Election Commission's petition for a writ of certiorari and summarily reverse the decision of the Second Circuit in this case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

POLITICAL CONTRIBUTIONS DATA, INC., RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1369—August Term 1992

(Argued: April 23, 1993 Decided: June 17, 1993)

Docket No. 92-6240

FEDERAL ELECTION COMMISSION, PLAINTIFF-APPELLEE

—against—

POLITICAL CONTRIBUTIONS DATA, INC.,
DEFENDANT-APPELLANT

Before:

PRATT and JACOBS, *Circuit Judges*,
and Whitman KNAPP, *Senior District Judge* for the
Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Shirley Wohl Kram, *Judge*, 807 F.Supp. 307 (S.D.N.Y. 1992),

entered July 30, 1992, denying defendant's motion for attorney's fees and other litigation costs.

Reversed and remanded for a determination of an appropriate award of fees and expenses.

Judge Jacobs concurs in part and dissents in part in a separate opinion.

VIVIEN CLAIR, RICHARD B. BADER, *Washington*, D.C. (Federal Election Commission), *for Plaintiff-Appellee.*

DAVID C. VLADECK, BRIAN WOLFMAN, Washington, D.C. (Public Citizen Litigation Group), *for Defendant-Appellant.*

KNAPP, *Senior District Judge*:

Defendant-appellant Political Contributions Data, Inc. ("appellant"), which had previously obtained from a panel of this Court an order dismissing the complaint in this action, appeals an order of the United States District Court of the Southern District of New York denying its motion for attorney's fees and other litigation costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("the EAJA").[1] The district court denied the application, finding it to be untimely and further finding the position of

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[1] 28 U.S.C. § 2412(d)(1)(A) provides that "a court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

plaintiff-appellee Federal Election Commission ("the Commission") in the underlying litigation to have been "substantially justified." For reasons that follow, we reverse.

BACKGROUND AND FACTS

The underlying litigation began as an enforcement suit brought by the Commission to enjoin appellant, a private company, from selling reports analyzing contributions to federal election campaigns. The Commission alleged that the sale of such reports violated 2 U.S.C. § 438(a)(4), a provision of the Federal Election Campaign Act of 1971 ("the Act") which directs the Commission to make available to the public lists identifying individuals who contribute more than $200 to federal election campaigns, but also provides that contributor information "may not be used by any person for the purpose of soliciting contributions or for commercial purposes." The district court granted the Commission's motion for summary judgment and an appeal was taken.

A panel of this Court [2] reversed and remanded with instructions to enter summary judgment dismissing the Commission's complaint, *Federal Election Com'n. v. Political Contrib. Data*, 943 F.2d 190 (2d Cir. 1991). The panel ruled that an analysis of legislative history established that the Commission had adopted an unreasonably restrictive interpretation of the provision in question and of its own corresponding regulation, 11 C.F.R. § 104.15(c) (1991)[3]. It fur-

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[2] Meskill, Newman and Pratt, Circuit Judges.

[3] The FEC promulgated the regulation in order to determine what commercial activities are proscribed by the statute. The regulation provides:

ther ruled that such interpretation, by prohibiting the distribution of appellant's contributor lists, had defied the congressional intent behind the Act, namely to require disclosure of campaign contributions and contributors "in order to inform the electorate where campaign money comes from, to deter corruption, and to enforce the act's contribution requirements," 943 F.2d at 191. It observed that the government's reading of its regulation "would very likely run afoul of the first amendment," *id.* at 197. Proceeding "without the guidance of a reasonable agency interpretation," *id.* at 197, it determined that the purpose of the commercial exception contained in § 438(a)(4) was to protect political contributors from unwanted entreaties from vendors of merchandise such as "cars, credit cards, magazine subscriptions and cheap vacations," *id.* at 197. It further determined that the reports sold by appellant, which omitted the mailing addresses and phone numbers of the contributors and included a disclaimer against their use for soliciting contributions or any commercial purposes, "posed little, if any, risk" of unwanted harassment, *id.* at 197. It noted that the lists were "designed in a manner that will further first amendment values and not infringe contributor privacy by abetting solicitors," *id.* at 196. It accordingly concluded that their sale did not run afoul of either § 438(a)(4) or the Commission's pertinent regulation.

> The use of information, which is copied or otherwise obtained from reports filed [with the FEC], in newspapers, magazines, books or other similar communications is permissible as long as the principle purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes.

On October 5, 1991, appellant inquired of counsel for the Commission if it intended to seek *certiorari*, stating that if not it would file an application for fees pursuant to the EAJA. By letter dated October 30, counsel for the Commission responded that it had been decided that further review would not be sought. Subsequent attempts at settlement of the fee question were unavailing. On December 17, the Commission rejected an offer from the appellant; two days later, appellant filed its application for attorney's fees. The district court rejected the application, finding that (1) it was untimely, and (2) that the Commission's position in the underlying enforcement suit had been "substantially justified."

Fee applications under the EAJA must be filed within 30 days of a "final judgment," 28 U.S.C. § 2412(d)(1)(B), which is defined as a determination "that is final and not appealable." *Id.* § 2412 (d)(2)(g). Reasoning, that the announcement that the Commission did not intend to seek review of the panel's decision constituted a "final judgment," the district court determined that in order to comply with the EAJA, appellant would have had to have filed its fee application within 30 days of the October 30th letter, that is, by November 29, several weeks before the application had actually been filed.

Alternatively, the district court found that the Commission's position in the underlying litigation had been "substantially justified." Noting that the Commission had "adopted its interpretation of the Regulation and its corresponding litigation position in the absence of any contrary, or even clear, guidance from either Congress or the courts," it found that the agency was to be accorded substantial deference in

its interpretation of § 438(a)(4). Despite the panel's rejection of such interpretation, the district court concluded that it was still entitled to find that the Commission's position had been "justified to a degree that could satisfy a reasonable person."

DISCUSSION

A. Timeliness of the Application

In its recent opinion in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991), the Supreme Court ruled that "a 'final judgment' for the purposes of 28 U.S.C. § 2412 (d)(1)(B) means a judgment rendered by the court that terminates the civil action for which EAJA fees may be received. The 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired." 111 S.Ct. at 2162.

The contention that the Commission's October 30th letter to counsel for appellant was a "final order" which rendered appellant's fee application untimely was disposed of at oral argument. Commission counsel then unequivocally admitted that, despite counsel's letter, the Commission had retained the absolute right to change its mind and apply for *certiorari* at any time up until the deadline for such an application, namely on November 20, just thirty days before the petition for fees was filed. Had counsel been similarly forthcoming with the district court, that court might not have erroneously concluded that his simple letter constituted a final order terminating the civil action.

B. The "Substantial Justification" of the Commission's Position

Where, as here, there is no claim of "special circumstances" which would "make an award unjust," attorney's fees under the EAJA must be awarded to the prevailing non-government party unless the court finds that the position of the United States in the pertinent litigation to have been "substantially justified." 28 U.S.C. § 2412(d)(1)(A). To justify such a finding, the government must show that its position, both administratively and before the courts, had a reasonable basis in both law and fact. *Pierce v. Underwood*, 487 U.S. 552, 566 & n.2 (1988). The test is "essentially one of reasonableness," H.R.Rep. No. 1418 at 10, *reprinted* in 1980 U.S.C.C.A.N. The government has the burden of demonstrating substantial justification. *Environmental Defense Fund, Inc. v. Watt*, 722 F.2d 1081, 1085 (2d Cir.1983). In our statement of facts, *supra*, we note that the panel which had previously considered this case on the merits found the government's position to have been unreasonable. Thus we must determine the extent to which we are bound by that panel's finding that the Commission had failed to provide "a 'reasonable interpretation' of either its own regulation or of § 438(a)(4)," 943 F.2d at 196.

Appellant maintains that the reasoning behind the earlier panel's decision conclusively establishes that the government's position was not substantially justified. It relies on a Ninth Circuit case which was decided while this appeal was pending, *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (9th Cir. 1992). It was there held that a panel con-

sidering an EAJA fee application was bound by a previous panel's holding that the government's position had been unreasonable, at least when in so determining the first panel had carefully considered the language and legislative history of the statute in question.

The Commission, on the other hand, points to a series of cases for the proposition that this inquiry is a purely historical one, properly confined to an analysis of how the situation looked to the government before it lost its case. It reminds us that the EAJA is not an automatic fee-shifting statute, *Spencer v. N.L.R.B.*, 712 F.2d 539, 550 (D.C.Cir. 1983), and urges a standard for determining this question which is "separate and distinct from whatever legal standards governed the merits phase of the case," *FEC v. Rose*, 806 F.2d 1081, 1087 (D.C.Cir. 1986); *see also United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir. 1992), *cert. denied sub nom. Crandon v. United States*, 113 S.Ct. 73 (1992); *Welter v. Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991); *Griffon v. United States Dep't. of Health and Human Services*, 832 F.2d 51, 52 (5th Cir. 1987); *Cinciarelli v. Reagan*, 729 F.2d 801, 806 (D.C.Cir. 1984).

Having considered these positions, we conclude, as did the Ninth Circuit, that the earlier panel's careful analysis of the government's position allows no further consideration of this issue. This is so because the legal standards which governed the merits phase of this litigation are precisely those to be applied to the EAJA question. The government's position is deemed reasonable only if it has a "reasonable basis both in law and in fact," *Pierce*, 487 U.S. 552, 565. In granting summary judgment to appellant, the pre-

vious panel found the Commission's position unreasonable in light of the plain language and legislative history of the statute. It also found that the lists, compiled without addresses or phone numbers and bearing a warning against commercial use, posed no danger to the privacy interests which § 438(a)(4) was designed to protect. Neither the terms of the statute, its legislative history, nor the evidence concerning the nature of the lists involved were unknown to the Commission when it decided to undertake this litigation. We therefore find that the previous panel has conclusively established that the Commission's position was not substantially justified so as to bar an award of attorney's fees. Like the Ninth Circuit, "[w]e come to this conclusion not because the government lost its claim, but because a previous panel of this court determined that the statutory language and legislative history were clear." 980 F.2d at 1332.

In brief, contrary to the suggestion in the dissenting opinion, we have no occasion to assess the merits of the district court's exercise of discretion. We hold that in this unusual situation where a previous panel has specifically passed on every question before us, and has found the Commission's position to have been unreasonable in that it frustrated the intent of Congress and might jeopardize first amendment rights, the district court was—as are we—bound by the panel's conclusions. It would be hard to imagine how it could be held that one had been "substantially justified" in defying the will of Congress and jeopardizing First Amendment rights.

CONCLUSION

The order of the district court is reversed and the matter is remanded for the purpose of determining an appropriate award of fees and expenses.

JACOBS, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the majority as to the timeliness of the appellant's fee application. I respectfully dissent because I do not believe that the district court abused its discretion in finding that the Commission was substantially justified in pursuing its position on the merits.

The Commission lost its claim on the merits—in the only way it *could* lose on the merits of that claim —upon a finding that it adopted an *unreasonable* interpretation of the "commercial purposes" provision of 2 U.S.C. § 438(a)(4) (1988) and its corresponding regulation, 11 C.F.R. § 104.15(c) (1991). *See Federal Election Comm'n v. Political Contributions Data, Inc.*, 943 F.2d 190, 196 (2d Cir. 1991). Nevertheless, PCD was not entitled to fees if, *inter alia*, "the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A) (1988) ("EAJA"). Substantial justification (like the ruling on the merits) is a question of reasonableness. *Pierce v. Underwood*, 487 U.S. 552, 564 n.2 (1988) ("if a reasonable person could think it correct"). However, in the EAJA stage, the question is whether it was unreasonable for the Commission to litigate the reasonableness of its statutory interpretation. The EAJA reasonableness question is therefore considered

from a different point of view: "not what the law now is, but what the Government was substantially justified in believing it to have been." *Id.* at 561. Whether the Commission was substantially justified is a "historical" question. *Id.*

The majority (a) casts the issue as "the extent to which we are bound" by the unreasonableness findings of the previous panel; (b) adopts the Ninth Circuit rule that the EAJA panel is so bound if the first panel carefully considered the language and legislative history of the statute in question; and (c) holds that "the earlier panel's careful analysis of the government's position allows no further consideration of this issue." I disagree with this holding on several grounds, not least because it tends to frame the EAJA issue as a critique of the opinion on the merits: Was the merits opinion carefully considered? Was it clear and categorical? Was it inevitable?

At least in the first instance, this appeal concerning substantial justification should be resolved by reference to the district court opinion, rather than to this Court's 1991 opinion. Nothing in the 1991 opinion requires that we now reverse the district court's ruling on the distinct, historical issue of substantial justification. Appellant's sale of donor lists for profit was not a "commercial purpose" under § 438(a)(4), as the 1991 panel held, but that result was not a foregone conclusion. The 1991 opinion found that § 438(a)(4) cannot be literally applied; that § 438(a)(4) was made "skeletal" in order to permit the Commission to define the "commercial purposes" prohibition; that "we must . . . seek further guidance outside the FECA itself"; and that "the best guidance" is provided by legislative history. 943 F.2d at 194-98. A holding of unreasonable-

ness at the merits stage, however sound, is not necessarily a predictable result, especially where it turns in large part (as here) on legislative history.

As to the district court's opinion, we owe it more deference than the majority opinion gives it. The reasonableness standard applies at both stages of review (merits and EAJA), but reasonableness for EAJA purposes is considered from a different perspective and depends on a variety of factors that the district court may be best situated to evaluate. *Pierce v. Underwood*, 487 U.S. at 559-563. The Supreme Court in *Pierce* therefore deferred to the district court's judgment, holding that the issue of substantial justification presents "a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Id.* at 562.

In the case on appeal, the district court's carefully considered opinion held that the Commission was substantially justified *ex ante* in pursuing a position that the district court upheld on summary judgment, but that this Court, by way of a different analysis, held to be unreasonable. The district court has given detailed consideration to several factors, including the clarity of the governing law at the time the Commission acted; the foreseeable length and complexity of the litigation; and the consistency of the Commission's position. This Court previously considered these factors to be relevant. *See Dubose v. Pierce*. 761 F.2d 913, 918 (2d Cir. 1985), *vacated on other grounds*, 487 U.S. 1229 (1988).[1] I think the district

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[1] In *Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1985), this Court conducted a *de novo* review, and reversed the lower court's finding that the Government's position was not sub-

court's findings easily withstand review for abuse of discretion. To the extent the majority expands the 1991 reasonableness analysis to resolve the EAJA issue, the majority is engaging in *de novo* review. To the extent the majority relies on the 1991 opinion's outcome, the majority treats EAJA as a fee-shifting statute.

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stantially justified. 579 F. Supp. 937 (D. Conn. 1984). The Supreme Court vacated our judgment in light of *Pierce v. Underwood*, 487 U.S. 552 (1988), which held that the proper standard of review is abuse of discretion. On remand, applying that deferential standard, this Court affirmed the district court's finding. *Dubose v. Pierce*, 857 F.2d 889, 892 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 5238 (SWK)

FEDERAL ELECTION COMMISSION, PLAINTIFF

-against-

POLITICAL CONTRIBUTIONS DATA, INC., DEFENDANT

MEMORANDUM OPINION AND ORDER

[Filed July 30, 1992]

APPEARANCES:

For Plaintiff:

Federal Election Commission
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By: Vivian Clair, Esq.

For Defendant:

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By: Anne C. Vladeck, Esq.

SHIRLEY WOHL KRAM, U.S.D.J.

Defendant Political Contributions Data, Inc. ("PCD") moves for an order, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (d)(1)(A), awarding it $55,022.89 in attorneys' fees and expenses incurred defending this action in this Court and the Court of Appeals. *See Federal Election Com. v. Political Contributions Data, Inc.*, 753 F. Supp. 1122 (S.D.N.Y. 1990), and 943 F.2d 190 (2d Cir. 1991). Because the Court does not have jurisdiction over PCD's application, or in the alternative, because the Federal Election Commission ("FEC"), the plaintiff in the underlying action, was "substantially justified" in bringing suit against PCD, PCD's application for attorneys' fees and expenses is denied.

Background [1]

In 1986, PCD's parent company, Public Data Access, Inc. ("PDA"), compiled specialized contributor

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[1] The Federal Election Campaign Act ("FECA") requires all political committees "supporting a candidate or candidates for election to Federal office" to file reports of their respective contributors and the corresponding donations with the FEC. 2 U.S.C. § 438(b)(3)(A). In turn, FECA requires that all such reports filed with the FEC be made available to the public for inspection and copying. 2 U.S.C. § 438(a)(4). This broad public disclosure policy was qualified, however, in 1971 by 2 U.S.C. § 438(a)(4), which provides that "any information copied [from the FEC public records] . . . shall not be

lists from the FEC computer tapes recording campaign contributors. PDA then requested that the FEC issue an advisory opinion as to whether the selling of these lists comported with the statutory prohibition set forth in 2 U.S.C. § 438(a)(4). The FEC did so (Advisory Opinion 1986-25), concluding that the "proposal to engage in the for-profit business of selling lists of individual contributor information copied from reports filed with the Commission" would constitute use and sale for a "commercial purpose," thus violating 2 U.S.C. § 438(a)(4). Advisory Opinion 1986-25, attached as Exhibit "3," to FEC Complaint.

Despite the Advisory Opinion ("AO 1986-25"), PDA incorporated PCD to market these contributor lists. Shortly thereafter, the National Republican Congressional Committee filed a complaint with the FEC concerning PCD's lists, prompting the FEC to investigate PCD's activities. The FEC found "probable cause to believe" that PCD was violating the "commercial purpose" language of 2 U.S.C. § 438 (a)(4), and after conducting unsuccessful negotiations with PCD, the FEC brought this action for declaratory and injunctive relief, and civil penalties.

Subsequently, this Court granted summary judgment to the FEC, finding that the FEC's interpreta-

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sold or utilized by any person for the purpose of soliciting contributions or any commercial purpose." The prohibition aimed to protect the privacy of those "very public-spirited citizens" who contribute to political campaigns and those who might contribute if disclosure of their identity were limited. 117 Cong.Rec. 30,057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon). It was believed that without this prohibition, donating citizens would be subjected to "all kinds of harassment." 117 Cong.Rec. 30,057 (daily ed. Aug. 5, 1971).

tion of 2 U.S.C. § 438(a)(4), i.e., that the "commercial purpose" language could include activities "other than direct political solicitation," was reasonable and that under such interpretation, PCD's sales of contributor information lists could reasonably be characterized as for "commercial purposes." *Federal Election Com.*, 753 F. Supp. at 1126. Furthermore, this Court found that the FEC had correctly concluded that PCD's lists were not exempt from the prohibition under the "media exception," contained in 11 C.F.R. § 104.15(c) (the "Regulation").[2] *Federal Election Com.*, 753 F. Supp. at 1129.

On appeal, the Court of Appeals reversed this Court's decision and entered summary judgment in PCD's favor. The Court of Appeals held that PCD's use and sale of these lists was not proscribed by 2 U.S.C. § 438(a)(4) because the contributors' addresses and phone numbers were not contained on PCD's marketed lists and the lists specifically stated that the government forbade the information contained in the lists from being used for solicitation purposes. It further held that the FEC's interpreta-

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[2] The Regulation was adopted by the FEC in furtherance of 2 U.S.C. § 438(a)(4). The Regulation provides in pertinent part, that the copying of the FEC's reports by "newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information . . . for the purpose of soliciting contributions or for other commercial purposes." 11 C.F.R. § 104.15(c) (1992).

Once the FEC concluded that an organization's activities were for a "commercial purpose," it would determine whether the activities fell within the exemption for the specified media sources which would preclude a violation of 2 U.S.C. § 438(a)(4).

tion of the Regulation, as set forth in AO 1986-25, was "unreasonable," as it limited the "media exception" to those communications which were not using the FEC information principally to further sales. The Court of Appeals found this interpretation to be contrary to "both the words of the statute and the act's [FECA's] broader purpose" of promoting public disclosure. *Federal Election Com.*, 943 F.2d at 196.

The FEC did not appeal the Second Circuit's decision, and, on December 19, 1991, PCD filed its motion for an award of attorneys' fees and expenses under the EAJA.[3]

It is undisputed that PCD is the prevailing party in the underlying action concerning the alleged violation of 2 U.S.C. § 438(a)(4).[4] Thus, the disputed issues to be resolved in the present application for attorneys' fees and expenses are (I) the timeliness of PCD's application;[5] (II) whether the FEC's position was "substantially justified"; and (III) if PCD

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[3] The EAJA provides in pertinent part that:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412 (d)(1)(A).

[4] The Second Circuit directed summary judgment in PCD's favor. *Federal Election Com. v. Political Contributions Data, Inc.*, 943 F.2d 190 (2d Cir. 1991).

[5] The EAJA requires that the party applying for an award submit such application "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B).

did submit its application within the appropriate time period, and if the FEC's position was not substantially justified, what monetary award should be granted to PCD.

Discussion

I. Timeliness of Application

It is well established that unless an EAJA application for an award of fees and expenses is submitted within thirty days of final judgment in the underlying action, the Court lacks jurisdiction over the action. *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("the terms of [the Government's] consent to be sued in any court define that court's jurisdiction to entertain the suit"); 28 U.S.C. § 2412 (d)(1)(B) ("within thirty days of final judgment in the action").

For purposes of commencing the 30-day filing period, "final judgment" has been defined as "a judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). While there is no doubt that the finality of a judgment is most definitive when the statutory time limit for appealing the decision has actually expired, for EAJA purposes, a judgment has been found to be final when the "losing party asserts that no further appeal will be taken." *Taylor v. United States*, 749 F.2d 171, 174 (3d Cir. 1984) (citing *McDonald v. Schweiker*, 551 F. Supp. 327, 330 (N.D. Ind. 1982), *aff'd*, 726 F.2d 311 (7th Cir. 1983)).

While PCD agrees that a judgment may be deemed final when the losing party asserts it will not appeal the decision, it contends that the 30-day time period does not begin running until the losing party makes

a "legally" or "formally" binding [6] assertion that it will not appeal. The Court disagrees, and holds that such "formal" notification is not required. Rather, as the Eleventh Circuit held in *Myers v. Sullivan*, 916 F.2d at 679, all that is required to commence the 30-day filing period is "clear and unequivocal notice" that the judgment will not be appealed. *Id.* (since three of the four plaintiffs were given "no clear indication that [the Secretary of Health and Human Services] would not file appeals," the Court held that the 30-day period did not commence until the time to file an appeal expired; there was no requirement, however, that the notice be "legally" binding upon the Government).

In this case, the FEC provided clear and unequivocal notice that the Court of Appeals' decision would not be appealed. Such notification was given in response to a letter from PCD's attorney, David C. Vladeck, which specifically requested information concerning the status of an appeal. Mr. Vladeck re-

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[6] PCD does not explicitly define what it would deem "legally" or "formally" binding, but this Court assumes from PCD's language and from the cases that PCD cites that it intends the terms to mean that "the government must bind itself not to appeal in some enforceable way," *see* Reply Of Defendant Political Contributions Data, Inc. To The Federal Election Commission's Opposition To Defendant's Motion For An Award Of Attorneys' Fees and Litigation Expenses, at 3-4, or that there must be some discrete event indicating the finality of judgment. *See, e.g., Myers v. Sullivan*, 916 F.2d 659 (11th Cir. 1990) (post-remand final judgment of dismissal entered with the government's consent); *Smith v. Sullivan*, 739 F. Supp. 812 (S.D.N.Y. 1990) (remand order dismissed case with prejudice pursuant to a settlement and government stipulated that no further appeal would be taken).

quested that the FEC "inform [him] of the Commission's intentions" with respect to continuing the litigation. Letter dated October 2, 1991, attached to FEC Opposition to Motion for Award of Attorneys' Fees and Costs ("Pl. Opp."), as FEC Exhibit "1." He also informed the FEC that "if the Commission [did] not intend to pursue th[e] litigation further, then [he] [would] simply go ahead and file [his] fee application with the District Court . . . ." *Id.*

Richard Bader, FEC's attorney, responded by letter dated October 30, 1991 (the "Bader letter"), definitively advising that no appeal would be taken. Additionally, the Bader letter set forth reasons which demonstrated that the FEC would not revoke its decision. Specifically, the letter stated that:

> Because of the narrowness of the court's decision and the pendency of other cases raising the broader statutory and constitutional issues that constituted the bulk of the arguments in this case, the Commission has decided not to seek certiorari in the PCD case. Letter dated October 30, 1991, attached to Pl. Opp., as FEC Exhibit "B."

This Court finds that Bader's letter commenced the 30-day filing period as it clearly fulfilled *Myers* demand for "clear and unequivocal notice." Bader's letter constituted the final judgment for purposes of the EAJA, just as the Government's letters to the court and the prevailing party did in *Taylor*. Contrary to PCD's contention, notifying a court does not result in any greater legal consequence than merely notifying the other party, as was done by the FEC in this case. In either situation, a court may estop a

losing party which has executed such notification from subsequently instituting an appeal. Furthermore, Mr. Vladeck's letter clearly demonstrates that he intended to rely upon the FEC's response in determining whether to move for attorneys' fees and expenses, regardless of whether or not the FEC notified the Court of its choice.

Accordingly, the 30-day period for filing an application for fees and expenses expired on November 29, 1991 (30 days after Mr. Bader wrote his letter), nearly a month before PCD filed its application on December 19, 1991.[7]

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[7] PCD contends that two other factors should be considered by the Court in determining whether the time for filing had expired prior to the actual filing. First, PCD claims that because FEC did not correct PCD when PCD stated by mail and telephone that it considered December 21, 1991 to be the final date for filing, November 29, 1991 cannot be the date on which the 30-day period expired. This argument is without merit and does not effect the timeliness of PCD's application as the FEC had no duty to inform PCD of the correct date.

Second, PCD contends that because the FEC, itself, did not believe that Mr. Bader's letter commenced the 30-day filing period, PCD should not have been expected to recognize the significance of the letter's date. PCD argues that if November 29, 1991 were the final day for filing an application for fees and expenses, the FEC would not have engaged in settlement discussions through December 17, 1991. That the FEC engaged in settlement discussions after November 29, 1991, is not, however, dispositive as the FEC may still have paid PCD's attorneys' fees and expenses despite the absence of a legal obligation to do so. Further, the record in this case reveals that there was substantial confusion concerning the date on which the filing period expired. Given this confusion, the FEC could be expected to explore all possibilities, including settlement, in case final judgment was found not to have

II. Substantially Justified Governmental Claim

The Court holds alternatively that even if the Court did have jurisdiction, PCD's application would properly be denied on the grounds that the FEC's position in the litigation was "substantially justified." Costs and fees pursuant to 28 U.S.C. § 2412(d)(1)(A) may not be awarded to a claimant, if "the position of the United States was substantially justified." The Supreme Court has determined that a position is "substantially justified" if it has a "reasonable basis both in law and fact" or if it "could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord Cohen v. Bowen*, 837 F.2d 582, 585 (2d Cir. 1988); *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988); *Myers*, 916 F.2d at 666; *United States v. Yoffe*, 775 F.2d 447, 449-50 (1st Cir. 1985); *United States v. First Nat. Bank*, 732 F.2d 1444, 1447 (9th Cir. 1984).

The D.C. Circuit established a 3-prong test to determine whether a position taken by the Government was "substantially justified." *See Spencer v.*

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been entered on October 30, 1991. But even if the FEC did not recognize that Mr. Bader's letter would signify the final judgment for purposes of 28 U.S.C. § 2412(d)(1)(B), this would not alter the fact that the letter did in fact commence the filing period. *See Long Island Radio Co. v. NLRB*, 841 F.2d 474 (2d Cir. 1988) (because the United States government had statutorily established the lentgh of time after an action during which it would diminish its immunity from suit, the NLRB could not voluntarily extend the filing deadline). Accordingly, the notice given by Mr. Bader's letter constituted "final judgment" on October 30, 1991 and the time for filing an application for fees and expenses expired on November 29, 1991.

NLRB, 712 F.2d 539 (D.C. Cir. 1983).[8] Under *Spencer*, a court should examine (i) the clarity of the governing law, (ii) the foreseeable length and complexity of the litigation, and (iii) the consistency of the government's position, in determining whether the position of the Government was substantially justified. *Spencer*, 712 F.2d at 559-60. Based upon a review of these three factors, the Court finds that the FEC's position was "substantially justified."

(i) Clarity of the Governing Law

At the time the FEC brought suit against PCD for selling lists of contributor data, in violation of 2 U.S.C. § 438(a)(4), there was little congressional or judicial guidance concerning the relevant statutory provisions. In fact, congressional enactments promoted competing interests. While the general purpose of FECA was to provide total disclosure of political contribution data, 2 U.S.C. § 438(a)(4) aimed to protect contributors and would-be contributors from solicitators by limiting the distribution of contributing data. *Federal Election Com.*, 943 F.2d at 191. Even the Court of Appeals recognized the tension between 2 U.S.C. § 438(a)(4), and the general purpose of FECA, and in fact, concluded that because the language of 2 U.S.C. § 438(a)(4) seemingly undermined the general purpose of FECA, it could not

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[8] In Pierce, the Supreme Court held that the *Spencer* standard was more demanding than the EAJA required. However, the Court finds that the *Spencer* test remains relevant to the determination of whether the FEC's position was "substantially justified."

interpret the statute according to its plain meaning. *Federal Election Com.*, 943 F.2d at 194-95.

Further, the legislative history supplied the FEC with few guidelines for the interpretation of 2 U.S.C. § 438(a)(4). The only aid which the congressional records provided was to indicate to which activities the statute would apply. The discussion on the Senate floor revealed merely that list brokers were explicitly proscribed from selling lists of donors and donations and that newspapers were expressly permitted to publish such lists. 117 Cong.Rec. 30,057-58 (1971). Thus, the Senate created a broad spectrum between permitted and proscribed activities, but did not furnish the FEC with any further direction as to the proper treatment of other actors which copied FEC records for sale but which could not be defined either as newspapers or list brokers.

Nor had the courts offered any meaningful interpretation of 2 U.S.C. § 438(a)(4) or the Regulation, 11 C.F.R. § 104.15(c), prior to this suit. The only decision addressing the legality of a similar distributor's activities under 2 U.S.C. § 438(a)(4), *National Republican Congressional Committee v. Legi-Tech Corp.*, 795 F.2d 190 (D.C. Cir. 1986) (*"NRCC"*), refused to determine whether the organization's lists were forbidden, or even to enumerate characteristics common to a prohibited activity or to a "media exception," similar to newspapers. The Court instead found that Congress, in enacting 2 U.S.C. § 438(a)(4), had " 'left a gap for the [FEC] to fill' in determining what commercial activities f[e]ll within the proviso's prohibition (actively akin to that of a list broker) and what commercial activity

[was] not proscribed (activity akin to that of a newspaper)." *NRCC*, 795 F.2d at 193. The Court then found that the FEC had filled this gap with the Regulation, 11 C.F.R. § 104.15(c), but that since the FEC had not yet interpreted this regulation, the Court had to defer to the FEC for any substantive determination. *NRCC*, 795 F.2d at 193. Thus, the FEC was given no guidelines, and instead was encouraged to interpret its own Regulation.

(ii) Foreseeable Length and Complexity of the Governing Law

The record indicates that the FEC did not engage PCD in a foreseeably lengthy or complex proceeding. In fact, the FEC originally aimed to settle its dispute with PCD through negotiations, and it was not until it appeared that no settlement could be reached that the FEC filed this suit. Moreover, since this action predominately involved issues of law, neither party should have expected the proceedings to be particularly lengthy or complex.

Further, review of an agency's action, such as the FEC's, is frequently prompt and uncomplicated, as a court must uphold the agency action unless the agency's interpretation is found to be "unreasonable." *Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(iii) Consistency of the Government's Position

In *Spencer*, the D.C. Circuit held that if the Government was found to have " 'single[d] out' particular private parties . . . [and] adopt[ed] a gen-

eral policy in dealing with cases of a given variety but take[n] a different position inexplicably or maliciously in one or a few cases," it was necessary for the Government to present an especially powerful justification for its position in order to avoid paying the prevailing party's attorneys' fees and expenses. *Spencer*, 712 F.2d at 560-1. The FEC's position in the underlying action manifested none of the above attributes.

Since the FEC had not previously interpreted its regulation, and had not attempted to classify organizations as either similar to the specifically prohibited "list brokers" or to the explicitly exempted "newspapers," prior to AO 1986-25 issued to PCA, it is not possible that the FEC's position was inconsistent. Moreover, the FEC's position in this action greatly resembled the position of the plaintiff in the primary precursor to this case, *NRCC*. *NRCC*, 795 F.2d 190.

Furthermore, in this case, the Government never changed its position during the course of the proceedings or acknowledged the merit of its adversary's claims. In *Myers*, where three of the four consolidated plaintiffs were awarded attorneys' fees, the Secretary of Health and Human Services or the Appeals Council for the agency ultimately awarded Social Security benefits which originally had been denied by the Secretary.[9] *Myers*, 916 F.2d at 662-64. This implicit admission that the Secretary improperly denied benefits lends significant weight to the conclusion

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[9] The fourth plaintiff was denied attorneys' fees due to an untimely application, not because the Secretary was found to be "substantially justified."

that the Government's position was not "substantially justified." In this case, however, the FEC neither capitulated, nor adopted a different or more harsh position with PCD than with other possible violators. Accordingly, this Court finds that the FEC's position satisfies each prong of the *Spencer* test.

Beyond the *Spencer* analysis, the Court finds that the position adopted and pursued by the FEC had a "reasonable basis both in law and fact" as "could satisfy a reasonable person." *Pierce*, 487 U.S. at 565.

The Court of Appeals found both the FEC's interpretation of 2 U.S.C. § 438(a)(4) and the FEC's application of that interpretation to PCD to be "unreasonable." Consequently, PCD would have this Court adopt the conclusion that the FEC's position cannot satisfy the "reasonable" standard established in *Pierce*. But it is a well-established rule that a court defers to an agency's interpretation unless it finds it to be "unreasonable." *See Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. at 844 (1984). Thus, using PCD's analysis, any decision overruling an agency's interpretation would automatically result in the Government paying attorneys' fees and expenses to the other party. As *Spencer* concluded, however, Congress did not intend 28 U.S.C. § 2412(d)(1)(A) to be an automatic fee-shifting device. *Spencer*, 712 F.2d at 550. Accordingly, this Court may not terminate its inquiry with the Court of Appeals' conclusion that the FEC's interpretation was "unreasonable," but rather, the Court must examine the legal basis for the FEC's interpretation of the Regulation and the factual basis

for the FEC's determination that PCD was akin to a "loan broker."

As set forth above, the FEC adopted its interpretation of the Regulation and its corresponding litigation position in the absence of any contrary, or even clear, guidance from either Congress or the courts. Moreover, there was never any indication prior to this litigation that the FEC's interpretation was unreasonable. In fact, the *NRCC* Court discussed the Regulation, yet never suggested that the Regulation's "principal purpose" clause [10] (the FEC's interpretation of which the Court of Appeals subsequently found "unreasonable") would affect the reasonableness of the FEC's interpretation, or that the clause varied from congressional intent.[11] *NRCC*, 795 F.2d at 193.

Further, in adopting the Regulation and issuing AO 1986-25, the FEC was forced to reconcile the two conflicting goals of FECA, namely "total" disclosure and the protection of public-spirited contributors. In trying to accommodate these competing objectives,

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[10] The principal purpose clause provides in relevant part: The use of information . . . in newspapers, magazines, books or other similar communications is permissible *as long as the principal purpose of such communications* is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes." 11 C.F.R. § 104.15(c) (emphasis added).

[11] The Second Circuit's opinion ultimately held that the FEC's construction of the "principal purpose" prohibition constituted an "unreasonable" limitation upon Congress' intent, as demonstrated in both 2 U.S.C. § 438(a)(4) and the "act's broader purposes." *Federal Election Com.*, 943 F.2d at 195-96.

the FEC fashioned a distinction between use of contributor information which was "incidental" to sales, and use for which the "primary focus" was creating sales (the former deemed permissible and the latter prohibited). AO 1986-25, at 4.

Ultimately, the Court of Appeals found this distinction to be "unreasonable," as it impermissibly narrowed the "media exception" of the Regulation and the "newspaper exception" at 2 U.S.C. § 438 (a) (4).[12] *Federal Election Com.*, 943 F.2d. at 196. The Court of Appeals thus placed greater emphasis on the importance of public disclosure than the FEC had, but the FEC had not abandoned the pursuit of disclosure in its interpretation; it simply had attempted to establish a compromise, alleviating the inherent tension between the two goals. Given the conflict between FECA's terms, the lack of congressional and judicial guidance, the ambiguous gap which the FEC was required to fill, and that the legislative history only established a "newspaper exception," not an exception encompassing "similar communications,"[13] this Court finds that the FEC's position had a reasonable basis in law and was "substantially justified."

The FEC's factual determination that PCD's activities were prohibited under 2 U.S.C. § 438(a) (4) was

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[12] In a discussion of the purpose of 2 U.S.C. § 438(a) (4) prior to adoption, Senator Nelson asked Senator Bellmon, who presented the amendment to FECA on the Senate floor, whether under the amendment, "newspapers may, if they wish, run lists of contributors and amounts [?]." Senator Bellmon responded affirmatively, and no further media sources were designated as exempt from the 2 U.S.C. § 438(a) (4) prohibition. 117 Cong.Rec. 30058, col. 1.

also reasonable. The legislative history suggests a broad continuum along which permitted and prohibited activities are to be classified, but Congress failed to indicate how particular classifications should be determined. The *NRCC* Court found FECA "ambiguous" as to which activities were similar to newspapers and which were similar to list brokers and provided that the FEC was the proper body to determine an activity's permissibility. *NRCC*, 795 F.2d at 192.

Relying upon the following factors, the FEC reasonably characterized PCD as akin to prohibited list brokers: (i) the list format in which the information was distributed; (ii) the individualization and specialization of the lists available to accommodate PCD's clients' needs; (iii) PCD was incorporated exclusively for the purpose of advertising, marketing, and selling printed compilations of the FEC information; (iv) political parties or candidates and political consultants—clients who reasonably could be expected to make solicitations—comprised two-thirds of PCD's customers; and (v) during the FEC's investigation of PCD's customers, two customers indicated that they had intended to use PCD's list to solicit money for future campaigns. *Federal Election Com.*, 753 F. Supp. at 1130.

The Court of Appeals found that because only two of PCD's clients had purchased the reports for solicitation purposes and neither had actually used the lists for those purposes, PCD's activities constituted "similar communications," exempted under the Regulation's "media exception." But that some of PCD's

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[18] *See supra*, n. 12.

clients were interested in the lists for the exact purpose prohibited by 2 U.S.C. § 438(a)(4) indicates that the FEC did have a reasonable basis in fact to believe that PCD's activities may have violated the prohibition. Although PCD's lists did not contain street addresses or telephone numbers, they were hardly useless to a buyer aiming to make solicitations based on the information contained. Contributors' names, towns, states, and zip codes, and occasionally occupations, were distributed along with the amount of the respective contributions. Given this information, it would be quite simple to gather the missing information or contact the people despite its absence. Additionally, that a warning existed is not dispositive, as it is certainly conceivable that list brokers, clearly prohibited enterprises under 2 U.S.C. § 438 (a)(4), could also include a warning in an effort to limit their own liability.

Had PCD distributed a standard list of contributors' names and donations, as well as other information concerning political committees' funding, spending, activities, and had PCD's clients been primarily professors and research institutes, the FEC might not have been "substantially justified" in arguing that PCD's activities violated the "commercial purpose" prohibition. But PCD's actual lists and clients were not nearly so definitively exempted.

Finally, the "incident to" and "primary focus" terms used in AO 1986-25 which led the Court of Appeals to find the FEC's interpretation to be "unreasonable" and contrary to the general purpose of FECA, were not the sole factors inducing the FEC to file suit against PCD. While the FEC did find PCD's use of the FEC records to be more than incidental to

sales, the FEC grouped PCD with "list brokers," rather than with "similar communications" for additional reasons as well. The factors enumerated above, concerning the format of PCD's product, its clients, and its exclusive purpose, also supported the PCD's "list broker" classification. These factors may have reasonably led the FEC to the same conclusion, even in the absence of the flawed "incident to"/"primary focus" distinction. Consequently, this Court finds that the FEC's position that PCD was "actively akin" to list brokers, rather than newspapers, was reasonably based in fact, and thus, "substantially justified."

This Court further rejects PCD's contention that the Court of Appeals' opinion, which was "sharply critical of the FEC's argument," precludes a finding that the FEC's position was substantially justified. Memorandum Of Law In Support of Defendant's Application For An Award Of Attorneys' Fees And Litigation Costs, at 4-5. PCD's argument effectively ignores the Supreme Court's decision in *Pierce*. *Pierce* held that even a "string of losses" or a "string of successes" could only be "indicative" of whether the government's position was "substantially justified." *Pierce*, 487 U.S. at 565. Such a rule of law certainly would not permit this Court to find that a single decision against the FEC by the Court of Appeals necessitates, or even suggests, a finding that the FEC was not "substantially justified." PCD's argument is particularly weak in light of this Court's earlier decision favoring the FEC, which at the very least invites doubt to the proposition that the government's position was not "justified to a degree that could

satisfy a reasonable person." *Pierce*, 487 U.S. at 565. Nor does the Court of Appeals' deciding the case on summary judgment indicate that the FEC was not "substantially justified," as *Pierce* held that where "the dispute centers upon questions of law rather than fact," the "objective fact that the merits were decided at the pleadings stage" only proves that the judge was "efficient," not that the Government had a weak position. *Pierce*, 487 U.S. at 568-69. Accordingly, PCD's argument does not alter this Court's finding that the FEC was "substantially justified" under *Pierce* and the *Spencer* test.

III. Appropriate Monetary Award

As this Court finds that no attorneys' fees and expenses should be awarded under 28 U.S.C. § 2412 (d)(1)(A), there is no need to determine the appropriate hourly rate to be afforded to PCD's attorneys.

Conclusion

For the reasons set forth above, the Court finds that PCD's application for an award of attorneys' fees and costs, pursuant to the Equal Access for Justice Act, was untimely and is thus denied. The Court further finds that even if the application was timely, the award would be denied, as the FEC was "substantially justified" in bringing suit against PCD.

SO ORDERED.

/s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
United States District Judge

Dated: New York, New York
July 30, 1992

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of August one thousand nine hundred and ninety-three.

Docket Number: 92-6240

FEDERAL ELECTION COMMISSION, PLAINTIFF-APPELLEE

v

POLITICAL CONTRIBUTIONS DATA, INC.,
DEFENDANT-APPELLANT

[Filed Aug. 3, 1993]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellee, Federal Election Commission,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT,
ELAINE B. GOLDSMITH
Clerk

By: /s/ Kathy Brouwer
KATHY BROUWER
Operations Mgr.
8-3-93

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-350

FEDERAL ELECTION COMMISSION, PETITIONER

v.

POLITICAL CONTRIBUTIONS DATA, INC.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 31, 1993.

/s/ Clarence Thomas
Associate Justice of the Supreme
Court of the United States

Dated this 26th day of October 1993.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 5238 (SWK)

FEDERAL ELECTION COMMISSION, PLAINTIFF

-against-

POLITICAL CONTRIBUTIONS DATA, INC., DEFENDANT

MEMORANDUM OPINION

[Filed Dec. 10, 1990]

APPEARANCES:

For Plaintiff:

LAWRENCE M. NOBLE, General Counsel
Federal Election Commission
999 E Street, N.W.
By: Richard B. Bader, Associate General Counsel
Robert W. Bonham, III,
Acting Assistant General Counsel
Vivian Clair, Esq.

For Defendant:

Public Citizen Litigation Group
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By: David C. Vladeck
Alan B. Morrison

Vladeck, Waldman, Elias & Engelhard, P.C.
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New York, NY 10036
By: Anne C. Vladeck

SHIRLEY WOHL KRAM, U.S.D.J.

In this action for declaratory and injunctive relief, the Federal Election Commission (the "Commission" or the "FEC") seeks to enforce the provisions of the Federal Election Campaign Act of 1971 to prohibit defendant Political Contributions Data from selling compilations of contributor data reportable to the FEC under the Act. Defendant raises First Amendment, Fifth Amendment, and other defenses. Currently before the Court are defendant's motion and plaintiff's cross-motion for summary judgment.

BACKGROUND [1]

Plaintiff FEC is the independent agency of the United States government empowered with administering, interpreting, and enforcing the Federal Election Campaign Act (the "Act," or "FECA"). *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g (1980). Defendant Political Contributions Data ("PCD") is a for-profit corporation, wholly owned by Political Data Access, Inc. ("PDA"), which produces campaign contribution reports to sell to the public.

FECA requires political committees to report identification information, including name, address, occu-

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[1] The central facts are not in dispute by the parties, and are related here from the uncontested portions of the Complaint and the parties' Local Rule 3(g) statements.

pation and employer, of each person who contributes to that committee $200 or more in a year. 2 U.S.C. § 434(b)(3)(A).[2] The Act requires the Commission to make all such reports and statements filed with the Commission available for public inspection and copying, at the expense of the person requesting such copying, within 48 hours of the Commission's receipt of those documents. 2 U.S.C. § 438(a)(4). That provision, however, prohibits the sale or use of information copied from such reports by any person for the purpose of soliciting contributions or for commercial purposes. *Id.*[3] A rule promulgated by the

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[2] That provision states:

> Each report under this section shall disclose—
>
> * * * * *
>
> (3) the identification of each—
>
> (A) person (other than a political committee) who makes a contribution to the committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution.

2 U.S.C. § 434(b).

[3] The provision reads in full:

> The Commission shall—
>
> * * * * *
>
> (4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contribu-

FEC excepts newspapers, magazines, books or other communications from this provision. 11 C.F.R. § 104.15(c).

In January 1986, PDA obtained from the FEC certain computer tapes containing individual contributor information compiled from the disclosure reports, pursuant to § 434(b)(3)(A). By letters dated March 21 and June 24, 1986, PDA requested a formal advisory opinion from the Commission regarding the legality of selling individual contributor information obtained from disclosure reports made available by the Commission for public inspection and copying. In its resulting Advisory Opinion, the Commission stated that the sale of compilations of individual contributor information proposed by PDA would violate FECA. Advisory Opinion 1986-25, attached as Exhibit 7 to FEC's Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment (hereinafter "Pl. Mem. I"), at 4-5.

Thereafter, PDA incorporated defendant PCD,[4] and through it provided for the advertisement, mar-

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> tions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record.

2 U.S.C. § 438(a).

[4] Defendant explains that PCD was formed in response to the FEC's Advisory Opinion in an effort to insulate PDA,

keting, and sale in printed form of various compilations of the individual contributor information governed by § 438(a)(4). Defendant PCD compiled and sold two standard written reports: the Congressional District and the Corporate Affiliation contributors reports.[5] These reports contained the names of selected contributors, the amount and recipient of their contributions, along with the contributors' city, state and zip code. The reports did not contain the street address of the contributors. At the bottom of each page of the reports, the following caveat appeared:

> THIS REPORT MAY NOT BE USED OR SOLD BY ANY PERSON FOR THE PURPOSE OF SOLICITING CONTRIBUTIONS OR FOR ANY COMMERCIAL PURPOSE.

Defendant PCD also compiled and sold the results of special computer "runs" of the individual contributor information, often consisting of a short list of names and contributions. These short lists were usually communicated directly over the telephone or transmitted in letters.

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the parent company, from any liability that might flow from an enforcement action brought by the FEC. Deposition of Benjamin A. Goldman, President of PDA, taken January 3, 1990 (attached as Exhibit 17 to Plaintiff's Motion to Dismiss) (hereinafter "Goldman Deposition"), at 27-32; Deposition of Dr. Jay M. Gould, Chairman of PDA, taken January 3, 1990 (attached as Exhibit 11 to Plaintiff's Motion to Dismiss) (hereinafter "Gould Deposition"), at 48-49.

[5] The Congressional District Reports broke down the information by the 435 congressional districts, while the Corporate Affiliation Reports analyzed the contributions made by the officers and high-level employees of the 700 largest corporations in the United States.

As of June 6, 1987, defendants sold approximately 100 reports ranging in price from $5.00 for a single report to $776.25 for a combination of reports. They billed $9,398.76 and received $4,544.73 for their products as of that date.

On August 2, 1989, the FEC brought this action for declaratory and injunctive relief plus civil penalties, alleging that PCD violated 2 U.S.C. § 438(a)(4). Defendant answered on October 2, 1989, asserting constitutional defenses. PCD has moved for summary judgment on its defenses, arguing that the FEC's construction of that provision conflicts with the First Amendment and infringes its rights of Equal Protection; it also contends that the FEC's interpretation of the provision is incompatible with the provision itself and thus should be subject to a narrowing construction by this Court. The Commission has cross-moved for summary judgment. The Court first considers PCD's challenge to the rationality of the Agency's decision, because the Court should "not decide a constitutional question if there is some other ground upon which to dispose of the case." *Lowe v. SEC*, 472 U.S. 181, 190 (1985) (citations omitted).

DISCUSSION

I. Standards for Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c). In testing whether the movant has met this burden, the Court must resolve all ambiguities against the movant.

Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1187 (2d Cir. 1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).[6] The non-moving party then has the burden of coming forward with "specific facts showing that there is a genuine issue for trial." Rule 56(e). The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. To avoid summary judgment, enough evidence must favor the non-moving party's case such that a jury could return a verdict in its favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (interpreting the "genuineness" requirement).

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[6] The moving party may rely on the evidence in the record to point out the absence of genuine issues of material fact. *Celotex, supra*, 477 U.S. at 323. The moving party does not have the burden of providing evidence to negate the non-moving party's claims. *Id.* As the Supreme Court recently noted, "whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.*

II. FEC's Interpretation of 2 U.S.C. § 438(a)(4).

Section 438(a)(4) prohibits the sale "for the purpose of soliciting contributions or for commercial purposes" of information copied from the reports mandatorily filed by political committees. The Commission determined in its Advisory Opinion 1986-25 that the PCD reports were for commercial purposes within the meaning of the statute. It also found that the reports were more like brokers' lists, which are forbidden under § 438(a)(4), than like newspaper or other traditional media publications, which are excepted, 11 C.F.R. § 104.15.

Defendant now asks the Court, *inter alia*, to review that determination. PCD admits to selling information copied from these reports, but denies that its activity constituted use for "commercial purposes." It argues that the phrase "commercial purposes" should be narrowly construed to prohibit only using the lists directly for political solicitations, which PCD is not alleged to have done.

This Court must defer to an agency's reasonable construction of its own enabling legislation, absent inconsistency with an Act of Congress. *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (question properly before district court is not whether in its view the regulation is inappropriate in the general context of the regulatory program in question, but whether the Administrator's view that it is appropriate in the context of the program is a reasonable one).

Consistent with *Chevron*, this Court will accord deference to the FEC's interpretation of its own enabling legislation, the FECA. The FEC is "precisely the type of agency to which deference should

presumptively be afforded." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 39 (1981) (Court need only find that Commission's construction of statute is "sufficiently reasonable"); *accord Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (deference particularly appropriate in context of FECA, which explicitly relies on the bipartisan Commission as its primary enforcer); *see also FEC v. Ted Haley Congressional Committee*, 852 F.2d 1111, 1115 (9th Cir. 1988) (defer to FEC unless demonstrably irrational or clearly contrary to plain meaning of statute); *Orloski v. FEC*, 795 F.2d 156, 164-67 (D.C. Cir. 1986) (according FEC's interpretation of the Act "considerable deference").

Therefore, the Court will limit its inquiry to whether the FEC's determination that PCD's activity violates the Act is a reasonable one. It will review the FEC determinations: (1) that the "commercial purpose" language contained in the Act includes activity other than direct political solicitations; (2) that PDA's sale of the information gathered from the FEC's reports is among the forbidden commercial purposes; and (3) that PDA's activity does not fall within the media exception embodied in 11 C.F.R. § 104.15(c). Advisory Opinion 1986-25 at 4-5.

A. Breadth of the "Commercial Purpose" Provision

The Court first turns its attention to the FEC's finding that the "commercial purpose" language contained in the Act may be construed to include certain for-profit activity other than direct political solicitation. In light of the legislative history of the provision, this conclusion appears to be well-founded.

Senator Bellmon offered the present § 438(a)(4) as an amendment on the floor of the Senate while a number of amendments to the Act were being considered in 1974. He stated that the proviso's purpose "is to protect the privacy of the generally very public-spirited citizens who make a contribution to a political campaign or a political party." 117 Cong. Rec. 30057, col. 3 (1971). Senator Bellmon continued:

> We all know how much of a business the matter of selling lists and list brokering has become. These names would certainly be prime prospects for all kinds of solicitations, and I am of the opinion that unless this amendment is adopted, we will open up the citizens who are generous and public spirited enough to support our political activities to all kind of harassment, and in that way tend to discourage them from helping out as we need to have them do.

Id. In answer to a question from Senator Nelson, Senator Bellmon further explained:

> In the State of Oklahoma, our own tax division sells the names of new car buyers to list brokers, for example, and I am sure similar practices are widespread elsewhere. This amendment is intended to protect, at least to some degree, the men and women who make contributions to candidates or political parties from being victimized by that practice.

117 Cong. Rec. 30058, col. 1. Senate discussion of the amendment concluded with this exchange:

> MR. NELSON: Do I understand that the only purpose [of the amendment] is to prohibit the lists from being used for commercial purposes?

MR. BELLMON: That is correct.

MR. NELSON: The list is a public document, however.

MR. BELLMON: That is correct.

MR. NELSON: And newspapers may, if they wish, run lists of contributors and amounts.

MR. BELLMON: That is right; but the list brokers, under this amendment, would be prohibited from selling the list or using it for commercial purposes.

Id. The amendment passed by a voice vote. *Id.*

Defendant argues that the FEC's interpretation of "commercial purposes" to include PCD's activity is unreasonable. PCD would instead have the Court narrow the FEC's interpretation so that the statute would prohibit only the sale and use of contributor lists by commercial "list-brokers." Def. Mem. I at 17. It cites the above-quoted legislative history for the limited proposition that the Bellmon amendment "was designed to address one specific problem—the sale and use of contributor lists by commercial 'list-brokers'—*and nothing more.*" *Id.* (emphasis added); *see also* Def. Mem. I at 43.

The Court reviews the Commission's determination embodied in Advisory Opinion 1986-25 only for its reasonableness and not for wisdom. PCD's proposed narrower reading is both unpersuasive and unnecessary. A review of all of Senator Bellmon's remarks shows that he was concerned that the reporting provisions would open campaign contributors to a variety of solicitations, not just direct political solicitations.

See 107 Cong. Rec. 30057, Col. 3, *supra* ("these names would certainly be prime prospects for *all kinds of solicitations*"; "unless this amendment is adopted, we will open up [contributors] to *all kind of harassment*") (emphases added).[7] Under the standards of due deference set forth in *Chevron*, *supra*, 467 U.S. at 843-44, and in light of the Senate floor debate recounted above, the Commission's interpretation is eminently reasonable. There is no cause to limit the FEC to PDA's cramped reading of the Act, and the Court will not substitute its own judgment for that of the Agency.

B. PCD Lists and the "Commercial Purposes" Prohibition

The FEC has determined in its Advisory Opinion [8] that PCD's sales of its reports violate § 438(a)(4) because they are for a "commercial purpose." The Commission ruled that the company's status as a for-profit corporation raises a presumption of commercial purpose. Advisory Opinion 1986-25, at 4. The

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[7] The Court also notes that when Congress undertook to amend section 438(a)(4) in 1979, it did not disturb the Commission's broad construction of the "commercial purposes" provision, which was in all relevant respects the same as now. Pl. Mem. II at 4 & n.3 (citing 11 C.F.R. § 104.13 (1977); H.R. Rep. 422, 96th Cong., 1st Sess. 23 (1979), *reprinted in* FEC *Legislative History of the Federal Election Campaign Act Amendments of 1979* (1983) at 207).

[8] The Court refers to PDA and PCD interchangeably when discussing the FEC's findings regarding the reports. PCD's alleged conduct is identical to that proposed by PDA at the time of the request for an advisory opinion, but PCD was not yet formed. PCD is the only named defendant in this action.

FEC noted defendant's "plans to sell its lists to 'all who wish to buy them.'" *Id.* PCD has responded, both during the FEC investigation and during this litigation, that the information is to be marketed and sold primarily to public interest and nonprofit groups, researchers and journalists at low costs. It argues that although nominally for-profit,[9] it has never actually turned a profit on its product, because the lists are provided to nonprofit, nonpartisan groups at a reduced price. *See* Goldman Deposition at 47. The FEC determined that these statements do "not negate this presumption of commercial purpose." Advisory Opinion 1986-25 at 4. The Commission concluded that PCD's activities are proscribed by the "commercial purposes" provision of § 438(a)(4). *Id.*

In *National Republican Congressional Committee v. Legi-Tech Corp.*, 795 F.2d 190, 191 (D.C. Cir. 1986), the National Republican Congressional Committee ("NRCC") challenged the activities of defendant's Campaign Contribution Tracking Service, a product much like PCD's, which copied contributor information from the Commission and sold it for a profit. At that time, the FEC had yet to rule on whether such services violate § 438(a)(4), or instead whether they would fall under the media exception carved out by 11 C.F.R. § 104.15(c). The D.C. Circuit specifically left the question open, characterizing the issue as a "gap" which Congress left for the FEC to fill. 795 F.2d at 193; *see Chevron, supra*, 467 U.S. at 843-44 (Congress explicitly leaving gap for agency

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[9] Defendant also notes that 25% of PDA's shares are owned by the Council on Economic Priorities, a non-profit group whose principal is Jay Gould. Gould is the Chairman of PDA. Gould Dep., at 6.

to fill constitutes express delegation of authority to elucidate provision by regulation). It noted:

> The record before us fails to identify the subscribers to Legi-Tech's new Tracking Service. Furthermore, we do not know whether the FEC would deem Legi-Tech's communications to be 'similar' to those of a newspaper or how the FEC would apply its 'principal purpose' test to these facts. In light of the deference that must be accorded the FEC's interpretation of its own statute (and indeed its own regulation), any attempt on our part to resolve the present controversy would require judicial speculation as to the Commission's views.

Legi-Tech, supra, 795 F.2d at 193.

In the Agency proceedings underlying the instant litigation, the FEC filled that gap. It ruled that "copying and selling compilations comprised primarily of individual contributor names is prohibited by the Act." Advisory Opinion 1986-25 at 5. The Court now inquires whether there are genuine issues of material fact going to whether that resolution is arbitrary, capricious, or contrary to the statute. *Chevron, supra*, 467 U.S. at 844. It concludes that there are no such issues.

The Commission is entitled to rely on PCD's for-profit status as an indicator of its commercial purpose. The fact that PCD has not turned a profit on its product at this time does not indicate that it would not in the future, or does not intend to do so. PCD's own Chairman, Dr. Jay Gould, indicated at his deposition that although PDA had not yet been profitable, he was "still hopeful that in the long term

it has a very viable future . . . PDA is only four years old so we have another possibly five, six years to go." Gould Deposition, at 11; *see id.* at 19-20 ("it would be wonderful if some day [the burden of raising money for his business] could be alleviated by the prospect of earning revenues, and it's beginning to happen"); *see also* Goldman Deposition at 26 ("we certainly hoped to receive income that would cover the cost for producing this and would have certainly enjoyed any additional income, but we didn't").

Although the Court does not doubt the sincerity of PDA Chairman Gould's stated public-interest orientation,[10] his intent and that of PDA/PCD is not at issue. The critical point, rather, is that the company is engaged in a commercial venture using informa-

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[10] The Certificates of Incorporation of PDA and PCD read in relevant part as follows:

> The purposes for which the corporation is formed are: . . .
>
> * * * * *
>
> To provide economic information of public interest, taken from federal, state or other public files, and to edit, interpret and disseminate such information in the form of computer printouts, publications, diskettes and online retrieval for both private and public sector use.

PDA Certificate of Incorporation, Paragraph SECOND (attached as Exhibit 2 to Plaintiff's Motion for Summary Judgment); PCD Certificate of Incorporation, Paragraph SECOND (attached as Exhibit 8 to Plaintiff's Motion for Summary Judgment).

Dr. Gould indicates that through this business he wishes to foster greater public access to information regarding the interrelationships among donors, corporations, and congressional districts. He is interested in the issue of campaign finance from a public policy perspective. Gould Dep. at 21, 24, 26.

tion copied from the FEC reports. The depositions of the principals indicate that the companies formulated a complex pricing schedule and hired marketing consultants to help target likely purchasers. Goldman Deposition at 18-26. While PCD protests that it also gave reports away or sold them at nominal cost to nonprofit organizations, those numbers are quite small: PCD's invoice list names approximately 105 different customers who purchased its reports, whereas PDA president Goldman points out that it gave away reports to 6-12 journalists and "a few" persons in nonprofit or academic settings. Goldman Deposition at 44, 47.

The Commission has made the required showing that there [is] no evidence to support defendant's contention of the unreasonableness of the FEC's conclusion regarding commercial purpose. *Celotex*, *supra*, 477 U.S. at 323.

C. Applicability of the Media Exception to PCD Reports

Once the Commission determines that defendant's activity is for a commercial purpose, a potential distributor of FEC contributor information, such as PCD, may attempt to fit under the exception for "newspapers, magazines, books, or other similar communications." 11 C.F.R. § 104.15(c). The FEC considers that the " 'commercial purpose' prohibition does not preclude the communication of contributor information by" news media, so long as that use is "incident to" the sale of these publications. Advisory Opinion 1986-65 at 4.

The FEC ruled that PDA's use of contributor information in its reports "is not merely incident to

their sales but is the primary focus of PDA's activity." *Id.* In support of this ruling, the Commission pointed to the fact that the reports are "compilations composed primarily, if not exclusively, of individual contributor information and incorporating nearly all of the identification of individual contributors reported to the Commission. . . ." *Id.* The Commission took notice of defendant's statements that its purpose is to further research and reporting on patterns of political contributions, and noted its placement of the warning on each page of the reports; but the Opinion continued on to say that the FEC "does not view [these factors] as determinative of the principal purpose requirement" of § 104.15(c). *Id.* The FEC reasoned that PCD's lists would have value to list owners, managers[,] brokers and others, and that they are "essentially indistinguishable" from those of a list broker used for soliciting contributions or for commercial purposes. *Id.*, at 4-5.

PCD disputes this finding, maintaining that the commercial value of the lists is severely diminished, if not destroyed, by the omission of street addresses from the list,[11] the "salting" provisions of the reporting requirement,[12] and the warnings on each page

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[11] PCD apparently never received the addresses of contributors from the FEC. Defendant's response to Interrogatories before the FEC, ¶ 2 n.1, dated June 6, 1987 (attached as Exhibit 11 to Plaintiff's Motion for Summary Judgment).

[12] In 1980 Congress added a "salting provision," which appears in the final two sentences of the current version of § 438(a)(4). That amendment provides:

> A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of the names and addresses of contributors, provided such

that the information contained therein is not to be reproduced for commercial purposes.

The Court finds no factual question concerning the reasonableness of the Commission's conclusion that the FEC contributor information contained in PCD's reports is not incident to the sales but is the primary focus. Donor lists are an extremely valuable asset to political committees, "created through an expensive and laborious process of targeting and soliciting likely contributors." *Legi-Tech*, *supra*, 795 F.2d at 191 (referring to plaintiff NRCC's donor list as its "principal business asset"); *see also* Affidavit of Wyatt A. Stewart III, Director of Finance and Administration Division, National Republican Congressional Committee (Attached as Exhibit 25 to Plaintiff's Reply Mem.) (hereinafter "Stewart Aff."), at ¶¶ 9-14 (describing multi-step process of developing and protecting NRCC's mailing lists); Babcock, "Mailing Lists of '88 Contributors are Future Assets for Kemp, Robertson," Washington *Post*, March 13, 1988, at A14 (Attached as Exhibit 26 to Pl. Mem. II) (referring to donor lists in the 100,000-name range as "tangible asset[s]" of a campaign committee). Sixty-four of the 105 reports that PCD sold

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committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record.

See Pub. L. 97-187, § 109 (1980). The amendment "allows a committee to 'salt' the reports it files under the Act as a means of determining whether the names and addresses of its contributors are being used illegally." H.R. Rep. No. 96-522, 96th Cong., 1st Sess. 23-24 (1979).

PCD argues that the FEC has not been able to point to a single instance where a pseudonymous entity received a solicitation as a result of the distribution of PCD reports.

were issued directly to campaign committees of political parties or candidates, and another eight went to political consultants. These two categories alone constituted two-thirds of PCD's customers. Summary of PCD Purchasers, Annexed as Attachment 2 to Affidavit of Shelley Garr, FEC Paralegal Specialist, at 1.[13] The FEC has submitted uncontested evidence that several of the twenty-six PCD customers which the Commission was able to contact did in fact purchase the lists for solicitation purposes. One PCD customer, the Secretary and Treasurer of a political campaign committee, indicated in response to an FEC subpoena that the lists were not used for solicitation purposes because fundraising became unnecessary after the list was received in August 1986; however, he indicated that the lists "would have been used to solicit money for future campaigns." Letter of Fred Baier, Jr. to Lawrence M. Noble, General Counsel, FEC, dated June 24, 1988 (attached as Exhibit 13 to Plaintiff's Motion for Summary Judgment). Another customer, of unstated relationship to the Democratic Party, indicated that he purchased PCD product in the hope that it "might prove useful in support of the party's fundraising efforts." He ultimately decided not to use the information for solicitation purposes. He noted the disclaimer, the absence of mailing addresses, and the fact that only large contributors ($500 or more) were listed and that those people were for the most part already known to the Party or were Republicans who could

[13] Defendant does not challenge Garr's categorization of any of these customers. The Court notes that these numbers do not reflect the 6-12 reports that were provided to journalists, and the "few" others that went to academics or nonprofit organizations *gratis*.

not be expected to provide funds to the party. Letter of Robert F. Bauer, Counsel to Hal Kilshaw, to Lawrence M. Noble, General Counsel, FEC, dated August 4, 1988, at 2.

Defendant proffers the testimony of the journalist Edward Zuckerman and political consultant John Podesta in support of the proposition that using PCD's reports for political or commercial solicitations would not be economically feasible. Affidavit of Edward Zuckerman, Editor and Publisher of *PACs & Lobbies*, attached as Exhibit 8 to Defendant's Motion for Summary Judgment (hereinafter "Zuckerman Aff."), at ¶¶ 19-20; Affidavit of John D. Podesta, Vice President and General Counsel, Podesta Associates, Inc., attached as Exhibit 8 to Defendant's Motion for Summary Judgment (hereinafter "Podesta Aff."), at ¶ 11. The Court considers this testimony as speculative, because Zuckerman is not a political fundraiser and Podesta does not have firsthand experience working with PCD reports. Zuckerman Aff., ¶¶ 1-4; Podesta Aff. ¶ 8. Such speculation is, of course, insufficient to raise genuine issues of fact. *Matsushita Electric Industrial Co., supra*, 475 U.S. at 586. Moreover, even accepting their tesimony as true, the theory for which it stands does not defeat plaintiff's summary judgment motion. The mere availability of cheaper and more accessible substitutes would not excuse PCD's product from compliance with § 438(a)(4) if it were otherwise prohibited under the statute.

For summary judgment purposes, the uncontested record supports as reasonable the Commission's conclusion that PCD's product does not fall under the § 104.15(c) exception. Any inherent limitations on the reports' commercial value can be easily overcome using techniques common in fundraising circles. For

example, the missing addresses and phone numbers from PCD's lists may be supplied from other sources. PCD's Answers to Interrogatories, attached as Exhibit 11 to Plaintiff's Motion for Summary Judgment, at 10.[14] Also, PCD reports may be used as a cross-check to update and correct other lists. Goldman Deposition at 52 (PCD corrected transposed zip codes and standardized corporate spellings and other information); Advisory Opinion 1986-25 at 4-5; *see also FEC v. American International Demographic Services, Inc.*, 629 F. Supp. 317 (E.D. Va. 1986) ("commercial purpose" provision prohibits copying and selling lists incorporating nearly all identification information, because of comparison value); Advisory Opinion 1985-16 (use of contributor information to update or correct solicitation or mailing lists or otherwise to enhance their commercial value prohibited). Similarly, the lists have value in that they may be used to remind fundraisers of potential donors whose addresses they already know. FEC Exhibit 18 at 24-25.[15]

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[14] PCD so states in its answers to interrogatories; but its Chairman, Jay Gould, indicates that in his opinion it would be very difficult and uneconomical to match the names on PCD reports, which are organized by Congressional District and zip code, with the telephone book, which is otherwise organized. Gould Dep., at 76-78, 81-83.

[15] There is also uncontested evidence on the record that PCD's marketing agent targeted groups which perform substantial political solicitation activities. These "obvious key markets for PDA data" included committees registered with the FEC; state and local candidates; incumbent office holders; and lobbyists/trade groups/party committees. The fifth group was Baron Report/Cook Political Report/CQ subs. Memorandum of Sean Strub, Strub/Collins Inc., to Mike Tanzer,

The "salting" provisions are not of much assistance to PCD's argument because of the small numbers involved. Of the approximately 250,000 contributions that were reported to the FEC during the 1983-84 election cycle, the period which PCD's lists covered, each committee could use only a maximum of 10 such names, and some used none. Pl. Mem. II at 7 n.5 (citing 2 U.S.C. § 438(a)(4)). Therefore, the likelihood of any such "seed" appearing on a PCD list was relatively small.

The fact that non-fundraisers might also find PCD's lists to be useful is quite beside the point.[16] Even

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principal of PDA, dated May 21, 1986 (attached as Exhibit 22 to Plaintiff's Motion for Summary Judgment, at 1.) The Court cannot but conclude that even PCD's own marketing consultants believed that these data would be useful for commercial and/or solicitation purposes.

[16] One academic has submitted an affidavit on behalf of defendant indicating that, although he himself has not used PCD reports in his political science research, the reports could be of value to academics who study patterns of contributions in federal elections. Affidavit of Dr. Herbert Alexander, attached as Unnumbered Exhibit to Defendant's Motion for Summary Judgment (hereinafter "Alexander Affidavit,") at ¶¶ 13, 14. On the other hand, another of PCD's academician-customers who was contacted by the Commission did not find the reports particularly interesting or useful, and therefore discarded them. FEC Exhibit 13 at 15.

Defendant also submitted the affidavit of a journalist who indicated that the PCD reports were "invaluable" in his field, and gave several examples of how they could be used by journalists for non-commercial purposes. Zuckerman Aff. ¶¶ 9, 13-14, 17 *et passim*. Similarly, PCD submitted an affidavit from a political consultant who indicates that although he himself has not used PCD reports, he is of the opinion that PCD reports could be useful in conducting opposition research. Podesta Aff. at ¶¶ 7-10.

giving the benefit of the doubt to the testimony of defendant's witnesses, as is required on plaintiff's summary judgment motion, the mere fact that the reports could be used for a non-violative purpose does not raise a genuine issue of fact as to whether they are prohibited under § 438(a)(4). Regardless of to whom PCD prefers or anticipates selling its reports, the record indicates that most of PCD's customers were in fact political consultants, campaigns or committees, and that relatively few were academics or journalists. PCD Customer List, attached as Exhibit 12 to Plaintiff's Motion to Dismiss. The Court is not even so much concerned with whether the campaign committees that received PCD reports actually used the lists for solicitation purposes; more to the point is these entities' predominance among PCD customers, which belies PCD's statement that the reports are of interest "only to those involved in analyzing the role of contributions in the political process." Def. Mem. I at 8; *see* Def. Mem. II at 21.

Moreover, examining the legislative history, the Court is unable to say as a matter of law that the Commission's construction of the media exception as not including PCD's activity is unreasonable. The Commission construes § 104.15(c) to except media use of contributor information in such contexts as news stories, commentaries, or editorials. *Id.* (citing 117 Cong. Rec. S30,058 (daily ed. Aug. 5, 1971) (remarks of Sen. Nelson), *reprinted* in FEC, *Legislative History of the Federal Election Campaign Act of 1971* at 582 (1981) and *Legi-Tech*, *supra*). Turning again to the transcript of the Senate floor debate, Senators Nelson and Bellmon expressed the view that despite the prohibition on commercial use of con-

tributor information, newspapers ought to be able to present this information to the public. 117 Cong. Rec. S30058. The Commission concluded that the PCD reports, which virtually duplicate the FEC files *verbatim*, do not principally serve the purpose contemplated in the legislative history of the amendment. There are no factual issues which would prevent the Court from holding that this conclusion is reasonable, and the Court declines to disturb the FEC's determination in this respect.

III. Constitutional Challenges [17]

A. First Amendment

PCD's First Amendment challenge is directed at § 438(a)(4). Defendant argues that any prohibition on publishing contributor lists, such as the one found here for commercial purposes, is an "unlawful restraint on publishing lawfully obtained truthful information . . . ." Def. Mem. I at 24 (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-02 (1979); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 495 (1975)); Def. Mem. II at 3 (citing *The Florida Star v. B.J.F.*, —— U.S. ——, 109 S. Ct. 2603, 2607-13 (1989)).

It is well-settled that commercial speech is subject to diminished first-amendment protection. "Communication in a commercial setting may be subjected to regulation that ordinarily would be impermissible in a public forum." *Lowe v. SEC*, 472 U.S. 181, 182

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[17] The Court considers these issues *de novo*.

(1985) (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). The Supreme Court has recognized that the Government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik, supra,* 436 U.S. at 456.

Under this lower standard, PCD cannot successfully invoke First Amendment protection for its reports. The cases upon which PCD primarily relies are distinguishable in that they stand for the rights of traditional news organizations against various state interests that sought to enjoin widespread publication of certain information. *See, e.g., Smith v. Daily Mail Publishing Co., supra,* 443 U.S. at 101-102 (state cannot forbid newspapers from publishing otherwise public name of youth charged as juvenile offender); *Oklahoma Publishing, supra,* 430 U.S. at 311 (similarly); *Cox Broadcasting, supra,* 420 U.S. at 495 (reversing judgment of liability against news reporter for disclosing rape victim's name, obtained from publicly-available court files); *Florida Star, supra,* 109 S. Ct. at 2607 (similarly). Here, by contrast, the Commission specifically provides for traditional news media to publish the information contained in FEC files so long as the use of that information is "incident to the sale of such communications," and the "principal purpose" of the communications is not to communicate any contributor information for solicitation or other commercial purpose. 11 C.F.R. § 104.15(c).[18]

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[18] Obviously, this distinction is contingent on the outcome of PCD's Equal Protection challenge, based on the Commission's differential treatment of PCD and the "traditional media," *post.*

The purpose of the statute, as discussed *ante*, is to prevent harassment of political contributors as a result of the Act's disclosure provisions. In enacting FECA, which seeks to enhance the integrity of the electoral process, Congress struck a delicate balance between competing considerations of public disclosure, privacy and free speech. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). The Court recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* Congress has required committees to report the names of contributors, and the Court has upheld that provision against challenges based on privacy of association and belief. *Id.* Recognizing the potential associational and privacy concerns connected with such a disclosure requirement, it is certainly rational for Congress to limit certain uses of that information through the Bellmon Amendment.

PCD emphasizes the ease with which a contributor may discard any such unwanted solicitations as might result from commercial publication of the FECA lists. *See, e.g.*, Def. Mem. I at 26 (describing the interest in freedom from the nuisance of having to throw away unwanted commercial solicitations as "trivial" and "weak").[19] This formulation of the issue misses the

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[19] PCD remarks that this interest is "much too weak to justify a blanket restraint on speech." Def. Mem. I at 26. However, the provision provides no such "blanket restraint," as is evidenced by the final substantive passage of the Advisory Opinion, which provides as follows:

> PDA's use of the contributor information in its database for academic research projects may be permissible, as long as this activity does not involve the sale or use of contributor information for the purpose of soliciting contributions or for other commercial purposes. [Citations

point. As Senator Bellmon observed, contributors might be dissuaded from making any such contributions if they knew that their identities would be reported to a governmental clearing house for sale to other hopefuls.

The provision serves rational economic ends as well. Through this provision, Congress expressed its legitimate concern that a contribution to one political committee represents one fewer contribution to another. *See* Pl. Mem. II at 20 n.17 ("the more times a donor is solicited and donates the less likely that donor is to give again") (citing Stewart Aff., at ¶ 15; Huntsinger, "Direct Mail: Sweeping Changes Since 1969," *Fundraising Management*, April 1989, at 64-66 (referring to direct mail fundraising as a "finite market")). It is perfectly reasonable for Congress to prohibit private businesses from using this information to the detriment of the committees who report to the FEC under mandate. This "zero-sum" situation distinguishes the present facts from those in the cases cited by defendant. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (striking down ban on mailings by lawyers to consumers); *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980) (overturning order which forbade utilities from including "bill inserts" addressing public issues); *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y.) (denying attempt to enjoin Commissioner of Motor

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omitted] Since PDA has not described a specific research project, however, this opinion should not be relied upon as approving any particular research activity. [citations omitted].

Advisory Opinion 1986-25 at 5.

Vehicles to sell automobile registration records to potential advertisers), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

Moreover, there are many other available routes by which this information circulates. The Commission supplies the information free of charge to all comers; it permits traditional media sources to publish the information if it is incident to their profitmaking activities; and the Commission permits unrestricted use or sale of contributor information copied from its files for academic research, "criticism, comment, [and] news reporting." Pl. Mem. I at 30 (quoting *Legi-Tech, supra*, 795 F.2d at 192); Advisory Opinion 1986-25 at 5. Commercially-oriented firms may also obtain this information themselves from the reporting committees, on whatever terms they choose to negotiate, and do with that information what they will.[20]

There is no factual issue precluding this Court from holding that the "commercial purposes" provision serves a rational purpose and does not impermissibly infringe on any cognizable free speech rights.

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[20] Additionally, the Commission expressly permits a political committee to post copies of reports of receipts and expenditures which were filed with the Commission, Advisory Opinion 1988-2 [¶ 5910], 2 Fed. Elec. Camp. Fin. Guide (CCH) [¶ 5910], and permits candidates for federal office to contact individual contributors listed on the reports filed by a political committee to inform them that the committee was unauthorized. Advisory Opinion 1984-2, *reprinted in* 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5748 (Feb. 14, 1984). It also permits candidates to use FEC lists to contact an opponent's contributors to correct allegedly defamatory statements made by the opponent. Advisory Opinion 1981-4, 1 Fed. Elec. Camp. Fin. Guide (CCH) [¶ 5590].

B. Equal Protection

The FEC has promulgated a regulation excepting newspapers, magazines, books or other similar communications from the proscription on use or sale of the information collected in the political contributor lists. 11 C.F.R. § 104.15. The rule allows these traditional media sources to use the information so long as the use is "incident to the sale of such communications," and the "principal purpose" of the communications is other than to communicate contributor information for solicitation or other commercial purposes.[21] *Id.* (citing 117 Cong. Rec. S30,058 (daily ed. Aug. 5, 1971) (remarks of Sen. Nelson), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act of 1971* 582 (1981); *Legi-Tech, supra,* 795 F.2d at 192). If the principal object of such communications is to communicate contributor information for solicitation or other commercial purpose, the use is impermissible. *Id.* The FEC ruled that PDA's intended use of contributor information does not fall into the "newspapers, magazines, books or other communications" exception promulgated in 11 C.F.R. § 104.15(c), because the lists are not merely incident to their sales but are the primary focus of PDA's activity. *Id.* at 4.

PCD challenges the constitutionality of the regulation from the standpoint of the Equal Protection Clause of the Fourteenth Amendment, as back-incorporated against the Federal Government by the Fifth Amendment Due Process Clause. *Johnson v. Robison,* 415 U.S. 361, 364 n.4 (1974). It contends that by allowing traditional media sources to pub-

[21] This distinction was found appropriate in *Legi-Tech, supra,* and codified at 11 C.F.R. 104.15(c).

lish information reported to the FEC while forbidding non-media firms from doing the same, the Agency is engaging in constitutionally impermissible favoritism. It cites several cases for the proposition that the government "may not grant the use of a forum to people whose views its [sic] finds acceptable, but deny use to those wishing to express less favored or more conventional views." Def. Mem. I at 36 (quoting *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); and citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978); *Consolidated Edison*, *supra*, 447 U.S. at 537-38). PCD also contests the Commission's ability evenhandedly to determine the publisher's "principal purpose," citing cases for the proposition that the Government should not be in the business of examining the content of publications. Def. Mem. I at 38. Finally, PCD argues that the press should enjoy no greater access to government information than that of the general public. *Id.*, 39-40.

At the outset the Court notes that even if it were to find PCD's Equal Protection arguments availing, such would not necessarily help PCD. For if the Court were to strike down the newspapers exception to § 438(a)(4), the proscription on "commercial purposes" use would remain intact. PCD's argument, if successful, might only stop newspapers from publishing this information, and would not necessarily establish PCD's right to sell the information.

In any event, the Court would find the Equal Protection arguments unavailing. The Supreme Court recently upheld a media exemption to a state statute prohibiting the expenditure of general corporate treasury funds on candidate elections. *Austin v.*

Michigan Chamber of Commerce, —— U.S. ——, 110 S. Ct. 1391, 108 L. Ed. 2d 652, 1990 US LEXIS 1665 (1990), presented a challenge to the State of Michigan's Campaign Finance Act. That Act, *inter alia*, prohibited corporations from expending general treasury funds for independent expenditures in support of political candidates. The Act excluded from the definition of "expenditure" any "expenditure by a broadcasting station, newspaper, magazine, and other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting." *Id.* at 1401 (citing Mich. Comp. Laws § 169.206(3)(d)) (footnote omitted). The Court, applying a "compelling state purpose" test, upheld the disparate treatment. It reasoned that

> media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'

Id. at 1401-02 (quoting *Bellotti*, *supra*, 435 U.S. at 781) (other citation omitted). The Court concluded that the media exemption from the campaign expenditure law does not offend the Equal Protection Clause:

> A valid distinction thus exists between corporations that are part of the media industry and

> other corporations that are not involved in the regular business of imparting news to the public.

Id. at 1402.

The Court finds this analysis equally applicable to the case at bar. The provision at issue imposes fewer restrictions on the expression of traditional media businesses than on certain other businesses, namely, PCD's report-selling operation. This distinction, however, is justified by a compelling governmental interest in assuring that the disclosure purposes of the Act are not frustrated by the protective device of § 438(a)(4). Like in *Austin*, the press in this case plays a "unique role" in the context of campaign finance, "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Id.* at 140. These concerns have already been upheld by the Supreme Court as substantial governmental interests. In *Buckley v. Valeo*, *supra*, 424 U.S. at 60-85, the Court identified these interests as follows:

> First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office.
>
> * * *
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.
>
> * * *
>
> Third, and not least significant, recordkeeping, reporting and disclosure requirements are an es-

> sential means of gathering the data necessary to detect violations of the contribution limitations described above.

Id. at 66-68 (citations and footnotes omitted).

It is constitutionally permissible for Congress and the FEC to have concluded that these interests would be thwarted if media were not excepted from § 438 (a)(4), but are not substantially threatened by the exclusion of other publication of contributor information for commercial purposes. Accordingly, the rule excepting traditional media from § 438(a)(4) satisfies substantial governmental interests.

None of the defendant's theories convince the Court otherwise. The cases it cites in support of its first and second theories are all distinguishable in that the statutory schemes there in question look to the nature of the communication in granting the use of a forum to a specific class of speakers. *See, e.g., Carey v. Brown, supra,* 447 U.S. at 462-63 (striking down statute prohibiting picketing of residences but exempting peaceful labor disputes); *First National Bank v. Bellotti, supra,* 435 U.S. at 784 (state may not prohibit corporations from communicating to public its views not "materially affecting" corporate business); *Consolidated Edison, supra,* 447 U.S. at 537-38 (declaring unconstitutional Public Service Commission order prohibiting inclusion in monthly utility bills of inserts discussing "political matters"); *FCC v. League of Women Voters of California,* 468 U.S. 364, 383 (1984) (striking down scheme requiring agency to determine whether a television program editorializes on "controversial issues of public importance"); *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 229 (1987) (invalidating

scheme which required tax commissioner to determine which publications were exempted from tax scheme based on content).

By contrast, nothing in the rules challenged here obligates the Commission to examine the contents of publications disclosing campaign finance information gleaned from FEC files. The Commission's "principal purpose" inquiry involves no substantive examination of the reports. In making the "principal purpose" determination in the present case, the Commission looked to solely non-content-based criteria, including, *inter alia*: (1) the corporation's for-profit status; (2) PCD's clientele, both actual and potential; and (3) PCD's willingness to sell reports to anyone who would pay their fees. *See generally* Advisory Opinion 1986-25. None of these bases involve the government "in the business of examining the content" of the reports (which, the Court additionally notes, express no political viewpoint whatsoever). Accordingly, the cited cases are inapposite.

PCD's third Equal Protection theory must also fail because under certain circumstances, the government may accord the press special privileges over members of the general public. *See Austin, supra*, 110 S. Ct. at 1401, and accompanying discussion; *see also Buckley v. Valeo, supra*, 424 U.S. at 93 n.127 (citations omitted) (special news media protections "the rule, not the exception"); *cf. Readers Digest Assn. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981) (press exemption only applies to normal press functions; other political activities by institutional press subject to Act's restrictions). For the reasons discussed above, those circumstances are satisfied here.

In sum, the exemption of traditional media organizations embodied in the regulations at issue here ful-

fills a substantial governmental interest and does not offend the Equal Protection clause. The Court accordingly denies summary judgment to defendant PCD on its Equal Protection defense and grants summary judgment to the plaintiff FEC on its claims.

CONCLUSION

For the reasons stated above, the Court declines to disturb the FEC's determination that PCD's sale of its reports are proscribed by 2 U.S.C. § 438(a)(4). It also rejects PCD's First and Fifth Amendment challenges to that provision and 11 C.F.R. 104.15(c).

The Court accordingly DENIES defendant's summary judgment motion in its entirety; and it GRANTS plaintiff's motion for summary judgment in full.

Settle Order Accordingly.

/s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
United States District Judge

Dated: New York, New York
December 16, 1990

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1779—August Term 1990

Argued: July 8, 1991 Decided: August 21, 1991

Docket No. 91-6084

FEDERAL ELECTION COMMISSION,
PLAINTIFF-APPELLEE

—against—

POLITICAL CONTRIBUTIONS DATA, INC.,
DEFENDANT-APPELLANT

Before:

MESKILL, NEWMAN and PRATT,
Circuit Judges.

Defendant appeals from a judgment of the United States District Court for the Southern District of New York, Shirley Wohl Kram, *Judge*, granting plaintiff's motion for summary judgment, and (1) declaring that defendant violated 2 U.S.C. § 438(a)(4), (2) imposing a civil penalty of $5,000 on defendant, and (3) permanently enjoining defendant from "selling or using for the purpose of soliciting contributions or for commercial purposes any information copied

from reports and statements filed with the Federal Election Commission pursuant to the Federal Election Campaign Act of 1971".

Reversed and remanded.

RICHARD B. BADER, Associate General Counsel, Washington, DC (Lawrence M. Noble, General Counsel, Vivien Clair, Federal Election Commission, of Counsel), *for Plaintiff-Appellee.*

DAVID C. VLADECK, Washington, DC (Public Citizen Litigation Group, Alan B. Morrison; Vladeck, Waldman, Elias & Engelhard, Anne C. Vladeck, New York, NY, of Counsel), *for Defendant-Appellant.*

MITCHELL H. BERNSTEIN, Washington, DC (Skadden, Arps, Slate, Meagher & Flom, Thomas J. Casey, Roberto Iraola, of Counsel), *for amicus curiae Legi-Tech, Inc.*

PRATT, *Circuit Judge*:

It is a cardinal principle of statutory construction that congress is presumed to have passed statutes which are constitutional. Thus, we are obliged to construe statutes to avoid constitutional problems whenever possible. *See, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575 (1988); *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181, 207 (1985) ("the apparent intent of Congress [was] to keep the Act free of constitutional infirmities"); *Hooper v. California*, 155 U.S. 648, 657 (1895) ("every reasonable construction must be resorted to, in order to save a statute from unconsti-

tutionality"). Moreover, when congress indicates that its goal in passing a statute is to *avoid* constitutional problems, our task is made easier. This is such a case.

Congress passed the Federal Election Campaign Act of 1971 ("FECA", or "the act") in order to, *inter alia*, require disclosure of campaign contributions and contributors. Congress determined that this disclosure was necessary in order to inform the electorate where campaign money comes from, to deter corruption, and to effectively enforce the act's contribution limitation requirements. *See generally Buckley v. Valeo*, 424 U.S. 1, 66-68 (1974).

The FECA's broad disclosure requirements, as well as the legislative history of the act, indicate that the FECA holds, as its overarching philosophy, the principle that "[p]publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best disinfectant; electric light the most efficient policeman." Brandeis, *What Publicity Can Do*, Harper's Weekly, Dec. 20, 1913, at 10 (quoted in Senate Comm. on Commerce, Federal Election Campaign Act of 1971, S. Rep. 96, 92d Cong., 2d Sess. (additional views of Sen. Griffin), *reprinted in* 1972 U.S. Code Cong. & Admin. News 1773, 1816).

Today, we are faced with FEC's attempt to limit the FECA's broad disclosure requirements through the "commercial purposes" restriction contained in 2 U.S.C. § 438(a)(4). Specifically, we must decide whether the defendant, a corporation which produces campaign contribution reports to sell to the public, "sold or used" information culled from the FEC in violation of § 438(a)(4). Since we answer that question in the negative by reading the statute in a manner that avoids the first amendment problems that

the FEC's interpretation would engender, we not only further the intent of congress, but also need not reach the "important and troubling First Amendment implications raised by any construction of the statute that bars the use of the information at issue in this case by organizations such as" the defendant. *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 194 (D.C. Cir. 1986) (Wright, J., concurring) (hereinafter "*NRCC*").

LEGISLATIVE HISTORY OF § 438(a)(4)

The § 438(a)(4) "commercial purposes" exception was proposed as an amendment to that section by Senator Bellmon of Oklahoma:

> Mr. President, the purpose of this amendment is to protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party. We all know how much of a business the matter of selling lists and list brokering has become. These names would certainly be prime prospect for all kinds of solicitations, and I am of the opinion that unless this amendment is adopted, we will open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment, and in that way tend to discourage them from helping out as we need to have them do.

117 Cong. Rec. 30,057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon). Senator Bellmon's amendment was grudgingly accepted by the bill's sponsor, Senator Cannon, who replied:

> Mr. President, this is certainly a laudable objective. I do not know how we are going to

prevent it from being done. I think as long as we are going to make the lists available, some people are going to use them to make solicitations. But as far as it can be made effective, I am willing to accept the amendment, and I yield back the remainder of my time.

Id. (statement of Sen. Cannon). Senator Bellmon went on to give an example of the evils he was attempting to combat with this amendment:

Mr. BELLMON. * * *.

In the State of Oklahoma, our own tax division sells the names of new car buyers to list brokers, for example, and I am sure similar practices are widespread elsewhere. This amendment is intended to protect, at least to some degree, the men and women who make contributions to candidates or political parties from being victimized by that practice.

Mr. NELSON. Do I understand that the only purpose is to prohibit the lists from being used for commercial purposes?

Mr. BELLMON. That is correct.

Mr. NELSON. The list is a public document, however.

Mr. BELLMON. That is correct.

Mr. NELSON. And newspapers may, if they wish, run lists of contributors and amounts.

Mr. BELLMON. That is right; but the list brokers, under this amendment, would be prohibited from selling the list or using it for commercial solicitation.

Id. at 30,058.

FACTS AND BACKGROUND

The Federal Election Commission ("FEC" or the "Commission") is the independent agency of the United States government charged with the administration, and civil enforcement of the FECA. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a) & (e), 437f, 437g. FEC is specifically authorized to formulate policy under the act. 2 U.S.C. § 437c(b)(1). One of FEC's responsibilities is to serve as a clearinghouse for all campaign finance reports and statements filed under the requirements of the FECA. 2 U.S.C. §§ 432(g), 438(a)(10).

FEC maintains a computerized database which contains much of the financial information reported to the commission. This database can be searched by, *inter alia*, contributor's name, hometown, zip code, or employer. The public may obtain computer printouts of such searches and may also purchase magnetic computer tapes containing contributor information. During the 1987 calendar year, FEC received more than 70,000 such requests for information.

Defendant Political Contributions Data, Inc. ("PCD") is a New York corporation which is wholly owned by Public Data Access, Inc. ("PDA"), another New York corporation. PDA, in turn, is owned by its employees, private investors, and non-profit groups. PCD was formed in order to assemble and disseminate FEC data at a profit. In the words of Benjamin A. Goldman, an executive vice-president of PDA, PCD's compilations of FEC data "show how financial contributions support the current political superstructure, particularly with respect to the advantage enjoyed by incumbents over challengers." According to Goldman, these reports "facilitate research into the reason why contributors, both as indi-

viduals and on behalf of their affiliated companies, favor one candidate or another, particularly in light of their congressional committee assignments."

PCD marketed two standard reports. One, a "corporate affiliation contributor report," analyzed the contributions made by officers and upper-level employees of the 700 largest United States corporations. The other, a "congressional district report," listed the name of each major ($500.00 and up) contributor located within each of the country's 435 congressional districts, along with the recipient of the contribution, the contributor's occupation, and the amount of each donation. In addition, PCD occasionally compiled and sold the results of special computer searches, consisting of a short list of names and contributions.

None of PCD's reports contained the mailing addresses or phone numbers of contributors. Each page of each PCD report contained this warning:

> THIS REPORT MAY NOT BE USED OR SOLD BY ANY PERSON FOR THE PURPOSE OF SOLICITING CONTRIBUTIONS OR FOR ANY COMMERCIAL PURPOSE.

PCD's promotional brochure repeated this caveat and added: "Users must understand that under FEC regulations the use of FEC data for fund raising is strictly forbidden, and that the FEC records are probably 'seeded' to detect such unwarranted usage."

The "seed" warning refers to the second sentence of 2 U.S.C. § 438(a)(4) (commonly known as the "salting" provision), which allows political committees to

> submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such

> committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record * * *.

As of June 6, 1987, PCD had sold approximately 100 reports, ranging in price from $5.00 (for one report) to $776.25 (for a combination of reports). They had billed $9,398.76 and had received $4,544.73 for their products as of that date. PCD's chairman, Jay Gould, was nevertheless "still hopeful that in the long term [PCD] has a very viable future," as he indicated at his deposition.

On August 15, 1986, in response to a request from PDA, the FEC issued advisory opinion 1986-25, in which the FEC concluded that

> PDA's proposed activity that involves the copying and selling of compilations comprised primarily of individual contributor names is prohibited by the Act. PDA's use of the contributor information in its database for academic research may be permissible as long as this activity does not involve the sale or use of contributor information for the purpose of soliciting contributions or for other commercial purposes. See, 11 CFR 104.15(c); Advisory Opinion 1985-16.

PDA thereafter formed PCD as a subsidiary, and PCD continued to market the contributor lists.

In November 1986 the National Republican Congressional Committee ("NRCC") filed an administrative complaint with the FEC alleging that PCD's sale and use of information filed with the Commission by NRCC and others violated § 438(a)(4) of the act. After conducting an investigation, the FEC found "probable cause to believe" that PCD had violated

§ 438(a)(4). The FEC and PCD were unable to settle their dispute without judicial intervention, and on July 25, 1989 the FEC filed a civil enforcement suit against PCD in the Southern District of New York.

After discovery, the parties filed cross-motions for summary judgment. In an opinion reported at 753 F. Supp. 1122 (S.D.N.Y. 1990), Judge Kram granted the FEC's motion. First, Judge Kram determined that the commission's construction of § 438(a)(4) was a reasonable one, and accepted the commission's determinations (1) that the "commercial purposes" language of the act prohibited more than just direct political solicitations; (2) that PCD's sale of the information was among the prohibited "commercial purposes"; and (3) that PCD's activities did not fall within the "media exception" of 11 C.F.R. 104.15(c). 753 F. Supp. at 1126-32.

Since Judge Kram found that PCD's activities were prohibited by the terms of § 438(a)(4), she then addressed PCD's constitutional challenges to the statute, none of which she found compelling. 753 F. Supp. at 1132-37.

The judgment entered in favor of the commission (1) declared that PCD had violated § 438(a)(4), (2) imposed a civil penalty of $5,000.00 on PCD, and (3) permanently enjoined PCD from "selling or using for the purpose of soliciting contributions or for commercial purposes any information copied from reports and statements filed with the Federal Election Commission pursuant to the Federal Election Campaign Act of 1971."

PCD has renewed each of its arguments on appeal.

DISCUSSION

Although this is an appeal from a summary judgment, there is no dispute between the parties over any material fact. The only dispute is the application of § 438(a)(4) of FECA to the undisputed facts. As this is strictly a question of law, our review is *de novo*.

A. *Plain language of the statute*

Section 438(a)(4) of the FECA reads:

> (a) Duties of Commission
>
> The Commission shall—
>
> * * * *
>
> (4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection and copying, at the expense of the person requesting such copying, *except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes*, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record; * * *.

(emphasis added). It is undisputed that PCD did not use FEC information "for the purpose of solicit-

ing contributions"; thus, PCD's use of FEC material can only run afoul of § 438(a)(4)—if at all—by being "sold or used * * * for commercial purposes." The FEC concedes as much. *See* FEC brief at 8.

The FEC contends that PCD's activities fall squarely within the sweep of the "commercial purposes" prohibition, since PCD sold information compiled from FEC reports for a profit. FEC admits, however, that a literal application of the statute "would obviously impede, if not entirely frustrate, the underlying purpose of the *disclosure* provisions of FECA," as it "would bar newspapers and other commercial purveyors of news from publishing the information contained in those reports under any circumstances." *NRCC*, 795 F.2d at 192 (emphasis in original). PCD agrees with the FEC that reference to the plain language of the statute is insufficient; thus, we must move outside the four corners of the statute to "established canons of construction" in order to construe it. *Chisom v. Roemer*, 111 S. Ct. 2354, —, 59 U.S.L.W. 4696, 4702 (June 20, 1991) (Scalia, J., dissenting). *See United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) ("plain language" rule); *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) (same).

B. *The FEC's regulation*

Pursuant to its statutory authority, *see* 2 U.S.C. § 437d(a)(8), the FEC promulgated regulations in order to flesh out § 438(a)(4)'s skeletal "commercial purposes" prohibition. This gap was left "'* * * for the [FEC] to fill' in determining what commercial activities fall within the proviso's prohibition". *NRCC*, 795 F.2d at 193 (quoting *Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467

U.S. 837, 843 (1984)). *See also Dial Information Services Corp. of New York v. Thornburgh*, No. 90-6289, slip op. 6289, 6300-01 (2d Cir. July 15, 1991). FEC attempted to fill the gap with this regulation:

> The use of information, which is copied or otherwise obtained from reports filed [with the FEC], in newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes.

11 C.F.R. § 104.15(c) (1991). Thus, under the FEC's regulation, we shift our attention, at least initially, to the two prongs of the regulation: (1) whether PCD's use of FEC data is a "similar communication" to a newspaper, magazine, or book; and (2) if so, whether the "principal purpose" of PCD's communication is other than for "other commercial purposes."

1. *"Similar communication"*

PCD's use of FEC data may survive scrutiny under the first prong of the regulation only if the use is "similar" to a newspaper, magazine, or book. The FEC asserts that it promulgated this regulation in order to effectuate congressional intent. *See* FEC brief at 45 n.27. Since the FECA's broad disclosure provisions indicate an unmistakable preference for first amendment values of publicity and exposure, *see* S. Rep. No. 229, 92d Cong., 2d Sess. 4, *reprinted in* 1972 U.S. Code Cong. & Admin. News 1821, 1823 ("Disclosure, if it is to be effective, must mean total

disclosure"), we conclude that by the term "similar" communication congress intended to include one that furthers the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The only shred of legislative history relating to the "newspaper" exception to § 438(a)(4) supports the conclusion that congress intended to further this national commitment: "[N]ewspapers may, if they wish, run lists of contributors and amounts [without violating § 438(a)(4)]." 117 Cong. Rec. 30,058 (daily ed. Aug. 5, 1971) (remarks of Sen. Nelson).

In advisory opinion 1986-25, FEC construed the "similar communications" requirement of 11 C.F.R. § 104.15(c) in a more limiting manner:

> Commission regulations provide that the "use" of information, copied or obtained from these reports, in "newspapers, magazines, books or other similar communications" is permissible as long as the "principal purpose" of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes. * * * The "commercial purpose" prohibition does not preclude the use of contributor information by newspapers, magazines, books, or other similar communications such as in news stories, commentaries, or editorials, although such use may be incident to the sale of such communications. [citations omitted] [PCD's] intended use of contributor information is not merely incident to their sales but is the primary focus of [PCD's] activity.

FEC advisory opinion 1986-25, at 4. Here, the FEC only hinted as to what it believes is "similar" to a newspaper, magazine, or book, and it does so by creating a further distinction: between use which is "incident to" the sale and use which is the "primary focus" of the sale.

It is true, as the FEC reminds us, that "a court may not substitute its construction of a statutory provision for a reasonable interpretation by the agency charged with administering the statute," *NRCC*, 795 F.2d at 193; but neither should it bow and curtsy to every interpretation an agency can invent. The FEC's interpretation, however, does not serve the congressional purposes of furthering the openness and disclosure purposes of the FECA, while avoiding—to the extent possible—the invasions of contributor privacy that would be occasioned by all kinds of solicitations. We thus cannot say that FEC advisory opinion 1986-25 offered a "reasonable interpretation" of either its own regulation or § 438 (a)(4).

The "incident to"/"primary focus" distinction proffered by the FEC in its advisory opinion is contrary to both the words of the statute and the act's broader purposes. Indeed, the FEC's reading of the statute could bar even newspapers, magazines or books whenever FEC information was the "primary focus" of their publication. At bottom, the FEC's advisory opinion boils down to a "we know it when we see it" interpretation of § 438(a)(4), *cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), and we do not believe that congress intended to grant the FEC such uncabined discretion. Rather, the question of what is or is not "similar" to the enumerated examples should be answered by

closer attention to congress's intent to expose this information to beneficial sunlight, while protecting contributors, as best as possible, from the harassment of solicitors.

We conclude that PCD used the information obtained from the FEC in a communication "similar" to a newspaper, magazine, or book. PCD's lists, although not "traditional" media, are much closer to "commercial purveyors of news," *NRCC*, 795 F.2d at 192, than they are to a list of sales prospects. They are designed in a manner that will further first-amendment values and not infringe contributor privacy by abetting solicitors. In fact, we have previously noted that *amicus* Legi-Tech, Inc. (a for-profit corporation which assembles and markets publicly-available information—quite similar to PCD) is "an organ of the press." *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 730 (2d Cir. 1985).

2. *"Principal purpose"*

The second prong of 11 C.F.R. § 104.15(c) requires that "the principal purpose of the communication is not to communicate any contributor information listed on such reports * * * for other commercial purposes." The FEC, in its advisory opinion, handled this "commercial purposes" language in the following manner:

> The Commission has considered [PCD's] statements that its purpose is to further research and reporting of the patterns of political contributions and its promise that a warning relating to the Act's sale or use restriction will be printed on each page of the lists or packages, but does not view them as determinative of the principal purpose requirement. The Commission concludes that lists that compile individual contributor in-

> formation by congressional district and by employer will have commercial value to list owners, managers, brokers, and others, even though street addresses are omitted. The format and content of [PCD's] lists are essentially indistinguishable from those of a list broker used for soliciting contributions or for commercial purposes.

FEC advisory opinion 1986-25, at 4-5. In this advisory opinion, the FEC accepted that PCD's purpose "is to further research and reporting on patterns of political contributions," yet the FEC still concluded that "purpose" was not relevant to the interpretation of § 438(a)(4) or the FEC regulation.

Again, we disagree with the FEC. "Purpose" permeates the very text of § 438(a)(4). There is little, if any, risk that PCD's lists will result in solicitation or harassment of contributors. The absence from PCD's reports of mailing addresses and phone numbers, as well as the caveat on each page against solicitation and commercial use, make it virtually certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books, which are "commercial purveyors of news", *NRCC*, 795 F.2d at 192), not for commercial purposes (similar to soliciting contributions or selling cars). The undisputed facts confirm this analysis: of over 100 PCD customers, only two said that they had purchased the reports for solicitation purposes; neither one actually solicited using PCD's lists; and one of them specifically noted the disclaimer and the lack of addresses as factors which led him to abandon that idea. *See* 753 F. Supp. at 1130.

Under the FEC's interpretation of the "principal purpose" requirement, no newspaper could print, for

example, a list of contributions made by the top executives of a military contractor who had just received a large government contract (information that would surely be protected by the statute, if not by the first amendment). Nor could that newspaper print a list of the larger donors in the congressional districts that its circulation serves. In short, such a reading would plainly be contrary to the broader purposes of the FECA, and would very likely run afoul of the first amendment.

Without the guidance of a reasonable agency interpretation, we must again seek further guidance outside the FECA itself. When we look to the legislative history of the § 438(a)(4) prohibition, we find that Senator Bellmon, in proposing the amendment, was concerned with the possibility that contributors would have their personal lives interrupted by unwanted solicitations. The purpose of this restriction, he said, was "to protect the privacy of" campaign contributors by insulating them, as best as possible, from "all kinds of solicitations".

These remarks seem to offer the best guidance for interpreting § 438(a)(4)'s prohibitions; they clearly indicate that the overarching goal of the prohibitions was to protect campaign contributors from "all kinds" of unwanted solicitations. Without the "commercial purposes" prohibition, the only solicitations at which the statute would be aimed would be solicitations for contributions. Since those prohibitions extend to "the purpose of soliciting contributions" and "commercial purposes", we read the latter prohibition to encompass only those commercial purposes that could make contributors "prime prospects for *all kinds of solicitations*", 117 Cong. Rec. 30,057 (remarks of Sen. Bellmon) (emphasis added), *i.e.*, not merely solicitations for "contributions", but solicitations for cars,

credit cards, magazines, subscriptions, cheap vacations, and the like. In light of the prohibition's purported aim of protecting the privacy of campaign contributors and the FECA's broader aim of full disclosure, not to mention the serious constitutional problems that FEC's reading would engender, *see, e.g., Communications Workers of America v. Beck*, 487 U.S. 735, 761 (1988), this is the proper, reasonable reading of the "commercial purposes" provision.

Moreover, the privacy interests of contributors—the focus of the Bellmon amendment—are in no way damaged by this reading of the statue. The "use" of the information "for the purposes of soliciting contributions or for commercial purposes" is still prohibited by the terms of the statute. The "salting" provision of § 438(a)(4) helps to ensure that anyone who uses the information for any sort of solicitation —whether for contributions or for other forms of commerce—will be caught. The § 438(a)(4) prohibition is only violated by a use of FEC data which could subject the "public-spirited" citizens who contribute to political campaigns to "all kinds of solicitations". PCD's publications plainly are not designed in that manner. Since none of PCD's publications is of the type that could infringe on the contributors' privacy interests, the publications at issue may be sold without violating § 438(a)(4) of the FECA.

CONCLUSION

Because we interpret § 438(a)(4) to allow the sale of PCD's publications, we do not reach the first amendment and equal protection issues raised by PCD. The judgment of the district court is reversed, and the case is remanded with instructions to enter summary judgment for PCD dismissing the FEC's complaint.

APPENDIX G

EQUAL ACCESS TO JUSTICE ACT

28 U.S.C. § 2412

§ 2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in

sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the posi-

tion of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time

the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title,

the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

APPENDIX H

2 U.S.C. § 438(a)(4)

§ 438. Administrative provisions

(a) *Duties of Commission.* The Commission shall—

(1) prescribe forms necessary to implement this Act;

(2) prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting;

(3) develop a filing, coding, and cross-indexing system consistent with the purposes of this Act;

(4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record;

11 C.F.R. § 104.15

§ 104.15 Sale or use restriction (2 U.S.C. 438(a)(4)).

(a) Any information copied, or otherwise obtained, from any report or statement, or any copy, reproduction, or publication thereof, filed with the Commission, Clerk of the House, Secretary of the Senate, or any Secretary of State or other equivalent State officer, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committee.

(b) For purposes of 11 CFR 104.15, "soliciting contributions" includes soliciting any type of contribution or donation, such as political or charitable contributions.

(c) The use of information, which is copied or otherwise obtained from reports filed under 11 CFR Part 104, in newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes.

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No. 93-999

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

POLITICAL CONTRIBUTIONS DATA, INC.,
Respondent.

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the Second Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION

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January 1994

4 pp

QUESTION PRESENTED

This petition arises from a ruling by the Second Circuit that respondent is entitled to an award of attorneys' fees under the Equal Access to Justice Act ("EAJA"). Under the EAJA, a prevailing party is generally entitled to a fee award against the government unless the government can show that its position was "substantially justified." The question presented for review is:

Did the court of appeals correctly conclude that, in this "unusual situation where a previous panel has passed on every question" and determined that the petitioner's position "def[ied] the will of Congress and jeopardiz[ed] First Amendment rights," it need not reexamine the merits of the underlying litigation in order to determine that the agency's position was not "substantially justified?"

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In The

October Term, 1993

No. 93-999

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

POLITICAL CONTRIBUTIONS DATA, INC.,

Respondent.

MEMORANDUM FOR RESPONDENT IN OPPOSITION

STATEMENT

In order to understand why review is not warranted in this case, it is necessary to recount briefly the history of this litigation, including the proceedings before the lower courts on both the merits of the case and respondent's application for an award of attorneys' fees and litigation expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d).

1. *Background*. This case was an enforcement action brought by petitioner Federal Election Commission ("FEC") against respondent Political Contributions Data, Inc. ("PCD"), challenging PCD's right to sell reports analyzing

contributions to federal election campaigns. The FEC claimed that the sale of PCD's reports violated § 438(a)(4) of the Federal Election Campaign Act, 2 U.S.C. § 438(a)(4), which requires the FEC to make available to the public lists identifying individuals who contribute more than $200 to federal election campaigns, but goes on to state that contributor information "may not be used by any person for the purpose of soliciting contributions or for commercial purposes." PCD's reports were based on data obtained from the FEC, but were then combined with other publicly available information and refined to produce two types of reports that contained information that was unavailable from the FEC.

First, PCD produced Corporate Affiliation Contributor Reports, which analyzed the contributions made by officers and high-level employees of the 700 largest corporations in the United States. Pet. App. 80a. By revealing the extent to which candidates drew their support from individuals connected with certain industrial groups (*e.g.*, agriculture, defense contractors, or insurance), these reports shed light on the interests to which the candidates may be responsive. Second, PCD produced Congressional District Reports for each of the 435 congressional districts. These reports contained the name of each major contributor ($500 or more), the recipient, the contributor's occupation, and the amount of each contribution. *Id.* These reports enabled the reader to track the impact of major contributions on each congressional campaign, and the degree to which residents of one congressional district supported candidates in other districts.

None of PCD's reports contained mailing addresses or telephone numbers of contributors. Each page of every PCD report included a warning, reproduced in full at Pet. App. 80a, that use of the reports for "the purpose of soliciting contributions or for any commercial purpose" was forbidden. PCD's promotional material also cautioned that FEC records are generally "seeded" to detect unauthorized use; that is,

they contain fictitious names to alert the candidate or committee that submitted the list that it is being used for an unauthorized purpose. *Id.*

2. *FEC Proceedings*. Before PCD was organized, its parent corporation, Public Data Access, Inc. ("PDA"), requested an advisory opinion from the FEC on whether publication of the reports was prohibited by § 438(a)(4). PDA pointed out that the legislative history of that section makes it clear that the sole concern underlying the prohibition in § 438(a)(4) is to protect contributors to federal campaigns from a barrage of solicitations. PDA emphasized that it had no interest in engaging in or facilitating solicitation activities, but instead sought to promote the use of contributor data to stimulate research and reporting on patterns of political contributions. PDA also stressed that its reports would be useless to list-brokers and others because, without street addresses or telephone numbers, PDA's reports could not be used for solicitation purposes. Most fundamentally, PDA argued that its right to publish this information -- which was public by operation of law -- was secured by the First Amendment.

In Advisory Opinion 1986-25, the Commission determined that the sale of PDA's reports would violate the Act. Pet. App. 81a. The central reason given was that, because PDA is organized as a for-profit corporation, its sales of these lists are presumably made for commercial purposes. Pet. App. 50a. The FEC also rejected PDA's claim that it fell within the exception in the FEC's regulations permitting certain for-profit media organizations to publish contributor information, provided that the use of such information is "incident" to the sale of their communications. 11 C.F.R. § 104.15(c). The Advisory Opinion did not address PDA's First Amendment argument. In fact, during the FEC's deliberations on the draft Advisory Opinion, Commissioner Josefiak insisted that he was "not getting into whether or not that's constitutional," and Commissioner Harris stated that "I don't think it is an easy

case at all and I think we have a very hard time trying to enforce the statutory provisions without getting into problems under the First Amendment." *See* Joint Appendix in *FEC v. PCD*, No. 91-6084 (2d Cir.) at 160-61.

Following the issuance of the Advisory Opinion, PCD continued to distribute the reports. On November 10, 1986, the Republican Congressional Campaign Committee filed a complaint with the FEC alleging that the distribution of PCD's reports violated § 438(a)(4). Pet. App. 81a. The complaint did not point to a single instance in which a contributor received a solicitation attributable to a PCD report.

In March 1987, the FEC determined that there was reason to believe that PCD had violated § 438(a)(4). Pet. App. 81a. A lengthy investigation by the FEC's General Counsel ensued, and PCD was compelled to respond to extensive interrogatories and produce hundreds of records. The investigation uncovered no evidence that any recipient of PCD's reports had used them for solicitation purposes. Nevertheless, on May 9, 1989, the Commission voted to initiate this proceeding.

3. *Litigation on the Merits*. This action was filed by the FEC on August 9, 1989, in the United States District Court for the Southern District of New York. The complaint alleged that PCD had violated § 438(a)(4) by using individual contributor data copied from reports filed with the FEC for commercial purposes, and sought injunctive relief and civil penalties. Pet. App. 82a. The FEC again took extensive discovery, which overlapped with and expanded upon the discovery it had taken before the Commission. FEC lawyers deposed each of PCD's principals and one of its customers, and requested the production of all documents that bore any relation to the creation of the reports, PCD's sales and marketing efforts, or PCD's customers. Following discovery, both parties moved for summary judgment.

The district court granted summary judgment to the FEC, concluding that the FEC's construction of the Act is entitled to deference, and that the FEC's determination that the sale of PCD's reports violated § 438(a)(4) was not unreasonable. Pet. App. 46a-62a. At the FEC's urging, the court applied the commercial speech doctrine and rejected PCD's constitutional claims. Pet. App. 62a-72a.

The Second Circuit unanimously reversed. The court first observed that the FEC's construction of § 438(a)(4) raised "'important and troubling First Amendment implications,'" Pet. App. 77a (quoting *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 194 (D.C. Cir. 1986)(Wright, J., concurring)("*Legi-Tech*")), which were to be avoided, if possible.[1] The court then held that the FEC's determination that the sale of PCD's reports violated § 438(a)(4) "does not serve the congressional purposes of furthering the openness and disclosure purposes of the FECA, while avoiding -- to the extent possible -- the invasions of privacy that would be occasioned by all kinds of solicitation. *We thus cannot say that FEC advisory opinion 1986-25 offered a 'reasonable interpretation' of either its own regulation or § 438(a)(4).*" Pet. App. 87a (emphasis added). In so ruling, the court criticized the "incident to/primary focus" distinction developed in the Advisory Opinion as nothing more than a "we know it when we see it" interpretation of § 438(a)(4). *Id.* Rather, the court held, Congress intended § 438(a)(4) to be applied to expose contributor "information to beneficial sunlight, while protecting contributors, as best as possible, from the harassment of solicitors." Pet. App. 88a. Because PCD's

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[1] In the court of appeals, the FEC apparently recognized that it could not plausibly defend the commercial speech claim it had successfully pressed on the district court. Having abandoned this argument, the FEC itself removed one of the cornerstones of the district court's ruling.

reports are "designed in a manner that will further first amendment values and not infringe contributor privacy by abetting solicitors," *id.*, the court concluded that the FEC's attempt to suppress publication of PCD's reports frustrated "the congressional purpose of furthering the openness and disclosure purposes of FECA," and could not stand. Pet. App. 87a.

The court was also troubled about the First Amendment implications of the FEC's extreme position. As the court pointed out, "[u]nder the FEC's interpretation of the 'principal purpose' requirement, no newspaper could print, for example, a list of contributions made by the top executives of a military contractor who had just received a large government contract (information that would surely be protected by the statute, if not the first amendment)." Pet. App. 89a-90a. The implausibility of this argument led the court to admonish the FEC that "such a reading would plainly be contrary to the broader purposes of FECA, and would very likely run afoul of the first amendment." Pet. App. 90a.

Finally, the court flatly rejected the FEC's assessment that PCD reports were akin to those used by fundraisers for solicitation purposes. "There is little, if any, risk that PCD's lists will result in solicitation or harassment of contributors. The absence from PCD reports of mailing addresses and phone numbers . . . make[s] it virtually certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books, which are 'commercial purveyors of news'), not for commercial purposes (similar to soliciting contributors or selling cars)." Pet. App. 89a (citation omitted).

Having concluded that there was no basis for the FEC's case against PCD, the court reversed the judgment of the district court, and directed the district court "to enter summary judgment for PCD dismissing the FEC's complaint." Pet. App. 91a.

4. *The Attorneys' Fee Litigation.* After the Second Circuit issued its merits decision, PCD's counsel inquired whether the FEC intended to file a petition for certiorari. Pet. App. 5a. In a letter hand-delivered on October 30, 1991, the FEC stated that "the Commission has decided not to seek certiorari." *Id.* PCD then attempted to settle the attorneys' fee issue, but PCD's proposal was rejected by the FEC on December 17, 1991. *Id.* Two days later, PCD filed its fee application, which the FEC opposed for two reasons. *Id.* First, it argued that the application was untimely on the theory that the FEC's October 30 letter constituted a "final judgment" triggering the 30-day EAJA clock. *Id.* The FEC also contended that, despite the unequivocal ruling of the Second Circuit that its position was without merit, it was nevertheless "substantially justified" in bringing this action, and hence a fee award was unwarranted. *Id.*

The district court denied PCD's motion for fees, adopting the FEC's position in its entirety. Pet. App. 14a. The court first held that PCD's fee application was untimely because the FEC's "letter constituted the final judgment for purposes of the EAJA," Pet. App. 21a, and therefore "the time for filing an application for fees and expenses expired" thirty days later. Pet. App. 22a. Alternatively, the court ruled that PCD was not entitled to a fee award because the FEC's position in this case was "substantially justified." On this point, the court canvassed the numerous arguments the FEC had made in this litigation, and explained why, in its view, they were not unreasonable, despite the Second Circuit's explicit findings to the contrary. Pet. App. 23a-34a. The court also reasoned that its prior judgment in the FEC's favor substantiated the reasonableness of the agency's position. Pet. App. 33a-34a.

The Second Circuit once again reversed. On the timeliness issue, the court unanimously held that, since the FEC's letter did not surrender the agency's "absolute right to change its mind and apply for *certiorari*," the district court "erroneously concluded" that the letter "constituted a

final order terminating the civil action." Pet. App. 6a. On the substantial justification issue, the majority, consisting of Circuit Judge Pratt (who had authored the court's merits ruling) and Senior District Judge Whitman Knapp, first reviewed the governing legal principles, including this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), which directs courts to apply an "historical" inquiry into whether the government's position was substantially justified. Pet. App. 8a.

Having acknowledged the obligation of courts to undertake such an inquiry, the court then concluded that this case presented an "unusual situation," since the prior panel had examined precisely the same source material that the fee panel would have to review in making an historical inquiry into the reasonableness of the FEC's position. In fact, the court observed, the:

> previous panel found the Commission's position unreasonable in light of the plain language and legislative history of the statute. It also found that the lists, compiled without addresses or phone numbers and bearing a warning against commercial use, posed no danger to the privacy interests which § 438(a)(4) was designed to protect. Neither the terms of the statute, its legislative history, nor the evidence concerning the nature of the lists involved were unknown to the Commission when it decided to undertake this litigation.

Pet. App. 9a. In concluding that it should not reexamine a prior panel ruling on precisely the same point, the court relied on a Ninth Circuit decision following the same approach, *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (1992) -- a decision which the Solicitor General did not ask this Court to review. The FEC's petition for rehearing and suggestion for rehearing *en banc* were denied without dissent. Pet. App. 36a-37a.

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court for two basic reasons. First, contrary to petitioner's claim, the ruling below does not erect a "*per se*" rule requiring the shifting of fees whenever a court rejects an agency's construction of a statute or regulation it administers. Nor is there any inconsistency between the ruling below and this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988).

Second, the issues presented by petitioner are not sufficiently important to deserve the Court's attention. Even assuming that petitioner is correct that the Second Circuit misapplied *Pierce* -- and it is not -- petitioner's claims regarding the potential mischief that could result from the Second Circuit's ruling are vastly overstated. Moreover, review could not conceivably effect the outcome of *this* case. As the Second Circuit made clear, it believes that the FEC's actions here were legally indefensible under any standard of review. What is more, this is precisely the kind of case Congress envisaged when it enacted EAJA -- an action of dubious legal merit brought by the government that pitted the government's vast resources against those of a fledgling company ill-equipped to defend itself without the prospect of recovering fees. Accordingly, this Court should deny the petition for a writ of certiorari.

I. THE DECISION BELOW NEITHER ERECTS A *PER SE* FEE-SHIFTING RULE NOR CONFLICTS WITH *PIERCE v. UNDERWOOD* OR ANY OTHER DECISION.

Petitioner's principal claim is that the Second Circuit has created a *per se* rule that "transform[s] EAJA into an automatic fee-shifting device whenever the government loses a case on the merits because its interpretation of a statute or regulation it administers is not accepted by a court applying

the usual deferential standard of review." Pet. at 11. That is a gross mischaracterization of the Second Circuit's ruling. There is not a hint in the court's opinion which suggests that it was attempting to lay down a general rule to govern future cases. To the contrary, the court took pains to emphasize the uniqueness of this case, namely one in which a "previous panel has specifically passed on every question" relating to the question of substantial justification. Pet. App. 9a. Thus, the FEC's suggestion that the Second Circuit's opinion creates a *per se* rule of decision that binds future litigants is meritless.[2]

Nor will cases like this arise often in an EAJA context. This Court noted in *Pierce* that the typical EAJA case is *not* one like this case, where a court of appeals has reviewed the case on the merits and issued a detailed opinion. Rather, the vast majority of EAJA fee awards are made in social security cases, which the government loses or concedes in the district court and chooses not to appeal. As *Pierce* noted, "351 of the 387 EAJA awards in fiscal year 1986-1987 were against the Department of Health and Human Services and averaged $2,379," and the volume of EAJA applications has *declined* since *Pierce*. During 1992, only 273 EAJA applications were filed; 252 of these were against the Department of Health and Human Services, "nearly all" of which involved

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[2] Insofar as we can determine, in the nearly seven months since the court of appeals' fee ruling, *no* decision has cited, let alone relied on, the court's ruling on this issue. *See, e.g., SEC v. Kaufman*, 835 F. Supp. 157 (S.D.N.Y. 1993); *Kaleel v. Shalala*, 832 F. Supp. 738 (S.D.N.Y. 1993); *Melbourne Ridge v. Sullivan*, 1993 U.S. Dist. LEXIS 15380 (S.D.N.Y. 1993); *Fine v. Sullivan*, 1993 U.S. Dist. LEXIS 11706 (S.D.N.Y. 1993). In fact, the only case to cite the court of appeals' decision to date referred to its holding on the timeliness of PCD's application; not the merits. *See United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993).

social security determinations. Admin. Office of the U.S. Courts, *1992 Annual Report of the Director*, 92 & Table 26.

Based on its understanding of this typical EAJA litigation, *Pierce* concluded that two factors counseled in favor of an abuse of discretion standard to review district court EAJA determinations: first, the district court generally has superior familiarity with the case, and second, allowing an appellate court to address the merits as part of an EAJA inquiry could distort the "normal law-clarifying benefits that come from an appellate decision on a question of law." 487 U.S. at 560-61. Neither of these elements is present in a case such as this, where the appellate court has actually decided the merits and exercised its "law-clarifying" function.

The problem here -- which underscores the Second Circuit's observation that this was an "unusual situation" -- is not that the Second Circuit failed to give adequate deference to the district court's fee decision, but rather that, in assessing PCD's fee application, the district court refused to heed the Second Circuit's ruling on the merits. That ruling made it clear that the Second Circuit believed that the FEC's position was entirely unjustified and that the flaws in the agency's position were obvious from the outset. Instead of accepting the court of appeals' ruling, as it was obliged to do, the district court used its fee opinion to voice its continuing disagreement with the court of appeals on the merits. Like the district court chastised in *Oregon Natural Resources Council*, the district court here "held fast to its position that the government's interpretation of the statute was reasonable and critiqued the previous panel's reasoning and conclusion." 980 F.2d at 1332. An obstinate refusal by

a district court to apply a court of appeals' ruling is plainly an abuse of discretion.[3]

Nor is there any merit to petitioner's claim that the Second Circuit "reject[ed] application of the historical test for substantial justification" laid down in *Pierce*. Pet. at 14. The fact is that the Second Circuit agreed that such a review was required by *Pierce*; it merely held that the first panel had already engaged in such a review and that it would be inappropriate for a second panel to revisit questions already resolved by a different panel of the court. In the unusual circumstances of this case, that judgment is unassailable.

As framed by this Court in *Pierce*, the operative question under EAJA is "not what the law now is, but what the Government was substantially justified in believing it to have been" when it brought the underlying action. 487 U.S. at 561. But the Second Circuit's ruling on the merits demonstrates that the fee panel correctly concluded that the merits panel did, in fact, examine what the agency believed the law to have been when it brought this enforcement action and concluded that this case was meritless from the outset.

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[3] The district court's defiance is illustrated by examining two pivotal issues in the case. First, the court of appeals explicitly rejected the FEC's claim that PCD's reports could be used for solicitation purposes. Despite this, the district court still insisted that the "FEC reasonably characterized PCD as akin to prohibited list brokers." *Compare* Pet. App. 89a *with* Pet. App. 31a. Second, the court of appeals chastised the FEC for "invent[ing]" the distinction in its Advisory Opinion "between use of contributor data that is 'incident to' the sale [of a publication] and use which is the 'primary focus' of the sale," because the distinction boiled down to a "we know it when we see it" interpretation that was "contrary to both the words of the statute and the act's broader purpose." Once again, notwithstanding the court of appeals' conclusion to the contrary, the district court concluded "that the FEC's position had a reasonable basis in law and was 'substantially justified.'" *Compare* Pet. App. 87a *with* Pet. App. 30a.

There were two basic components to the court of appeals' merits rulings, both of which required the court to examine the reasonableness of the FEC's position when it filed its complaint. First, the FEC's Advisory Opinion and the arguments the agency pressed throughout the litigation, were premised on the notion that PCD's reports were "essentially indistinguishable from those of a list broker used for soliciting contributions." Pet. App. 89a. But the court of appeals flatly rejected this contention, because PCD's reports contained neither mailing addresses nor telephone numbers and because, *prior to filing this case*, the FEC had conducted a survey of over 100 of PCD customers and had found that *none* had used PCD's reports for solicitation purposes. *Id.* Thus, the initial panel had engaged in precisely the kind of review mandated by *Pierce* and had determined what should have been obvious to the FEC before it filed this case: that there was no basis for its factual claim.

The same is true for the FEC's legal theory. In concluding that FEC's reading of its statute and regulations were not reasonable, the merits panel reviewed the authorities that the FEC cited to defend its legal position: the text of the statute, its legislative history, and the D.C. Circuit's opinion in *Legi-Tech*, the only opinion construing § 438(a)(4) at the time the Advisory Opinion was drafted. After carefully reviewing these materials, the court found that the FEC's construction of both § 438(a)(4) and its regulations were not simply in error, but were so unreasonable as to warrant invalidation under the highly deferential standard of review set forth in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

As the second panel stressed, these are precisely the same authorities that would be analyzed in assessing what the agency reasonably believed the law to be at the time the action was commenced:

> In granting summary judgment to appellant [PCD], the previous panel found the Commission's position unreasonable in light of the plain language and legislative history of the statute. It also found that the lists, compiled without addresses or phone numbers and bearing a warning against commercial use, posed no danger to the privacy interests which § 438(a)(4) was designed to protect. Neither the terms of the statute, its legislative history, nor the evidence concerning the nature of the lists involved were unknown to the Commission when it decided to undertake this litigation.

Pet. App. 8a-9a.

In short, the fee panel did not eschew the historical inquiry mandated by *Pierce*. Rather, it found itself in the "unusual situation where a previous panel" had already engaged in that inquiry and "specifically passed on every question before us, and has found the Commission's position to have been unreasonable in that it frustrated the intent of Congress and might jeopardize first amendment rights." Pet. App. 9a. Under these circumstances, it was entirely proper for a second panel to consider and adopt the rulings of a prior panel of the same court. Indeed, doctrines of intra-circuit comity and law of the case counsel strongly against one panel second-guessing another.

Nor does *Pierce* compel a fee panel to revisit issues decided by a prior panel. To the contrary, the fundamental insights that animate *Pierce* point clearly in favor of the approach adopted by the Second Circuit. One important policy goal cited by *Pierce* is the settlement of fee disputes. Yet the FEC's position *encourages* relitigation of the merits at the appellate level, since an agency can escape liability if, in the context of an EAJA fee dispute, the fee panel is compelled to reassess the judgment of the merits panel. Worse, as just noted, the FEC's approach raises the

possibility of two panels of the same court reaching potentially conflicting answers regarding the reasonableness of the agency's position. Finally, *Pierce* emphasizes the need to ensure that fee litigation "does not become 'a second major litigation.'" *Pierce*, 487 U.S. at 581 (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). By insisting on full-scale relitigation of the merits in the context of a fee determination, the FEC's approach stands that goal on its head.

Accordingly, because the court below neither created a *per se* rule that somehow converts EAJA into an automatic fee statute, nor strayed from the teachings of this Court's decision in *Pierce*, review is not warranted.[4]

II. THIS CASE PRESENTS NO RECURRING OR IMPORTANT ISSUES OF FEDERAL LAW AND REVIEW WOULD NOT AFFECT THE OUTCOME.

Even if there were substance to the FEC's argument that the approach applied by the court below was incorrect -- and there is none -- this case still would not warrant review for several reasons.

To begin with, the FEC vastly overstates the significance of the ruling below. As we have explained, the Second Circuit's ruling does not establish a *per se* rule that will pre-determine the outcome in future EAJA cases, a point

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[4] As we have said, there is no basis on which this Court should grant review of the first question presented by the FEC. However, even if the Court were inclined to grant review on the first question, there is no reason for the Court to become enmeshed in the highly fact-bound and case-specific inquiry called for by the FEC's second question, which asks this Court to decide whether the FEC's position in this case was "substantially justified."

confirmed by the absence of any decisions applying the FEC's mythic *per se* rule in the seven months since the Second Circuit's ruling. Rather, the courts have recognized that this case presents an "unusual situation" that does not often recur.

Nor is there the volume of EAJA cases that would merit this Court's concern. As the statistics recounted in *Pierce* and reported by the Administrative Office of United States Courts make evident, there are very few awards under EAJA outside of the social security context, which are seldom appealed on the merits. Consequently, there are limits to the mischief even an erroneous EAJA ruling can cause.

There is also no possibility that review could conceivably have any impact on the outcome of *this* case. As this Court held in *Pierce*, the government's obligation under the "substantial justification" standard is to show that its position, both administratively and before the courts, had a reasonable basis in both law and fact. 487 U.S. at 566 & n.2. But as the discussion above makes clear, the FEC cannot hope to satisfy that test in light of Second Circuit's determination that this case was manifestly without merit, even before the FEC filed this action. To borrow from Judge William's opinion in *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1001 (D.C. Cir. 1987), there is no basis to believe that a remand here will be a wand to turn this "frog into a legitimate prince" for the FEC.

Finally, this is a textbook case for a fee award under EAJA. Congress enacted EAJA in response to its concern that small businesses "may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights." *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989). The purpose of the EAJA fee-shifting provision is "to eliminate for the average person the financial disincentive to challenge unreasonable governmental action." *Comm'r v.*

Jean, 496 U.S. 154, 163 (1990). PCD was placed precisely in that situation. From PCD's perspective, this proceeding was interminable, highly disruptive, and financially ruinous. This proceeding was brought before the FEC in November 1986, and was vigorously litigated before the Commission for nearly three years. PCD was forced to endure extensive discovery and file numerous submissions in order to safeguard its rights. Thereafter, this lawsuit was filed in July 1989 and not concluded on the merits until August 1991. PCD once again had to endure highly burdensome and expensive discovery. For a fledgling company like PCD, five years of intensive litigation against a government agency with unlimited resources to bring to bear -- with the threat of civil penalties hanging in the balance -- exacts a terrible toll. EAJA was enacted to mitigate the harshness of that result, and this Court should not permit the FEC to avoid paying PCD the modest fees -- $50,000 -- it seeks for defending itself in this litigation.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 93-999

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER

v.

POLITICAL CONTRIBUTIONS DATA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE UNITED STATES

The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), directs a court to award attorney fees to a prevailing party (with less than a specified level of assets) in non-tort civil actions brought by or against the United States, unless "the position of the United States was substantially justified." The court of appeals in this case determined that the government's position could not be "substantially justified" if that position had been rejected as unreasonable in the merits phase of the litigation. That holding directly affects all government agencies (not only the FEC),

because it seriously expands the government's liability for attorney fees under EAJA. The United States has a significant interest in assuring that the scope of its liability for attorney fees is not expanded beyond the limits established by Congress.[1]

STATEMENT

The Federal Election Campaign Act (FECA), 2 U.S.C. 431-455, requires the Federal Election Commission (FEC) to provide public access to the reports of political contributions filed by political committees and individuals, but prohibits the sale or use of the information so provided "for the purpose of soliciting contributions or for commercial purposes." 2 U.S.C. 438(a)(4)).

Respondent is a private company formed to sell information about political contributions. Pet. App. 43a. The FEC filed a civil enforcement action against respondent to enjoin its sale of lists of individual contributors to political causes, arranged by congressional district and corporate affiliation. These lists were derived from FEC-provided information. The FEC's suit was based on its view that the sale of these lists was a prohibited "commercial purpose" under Section 438(a)(4). Although the district court granted summary judgment to the Commission (Pet. App. 39a-73a), the Second Circuit reversed. *Id.* at 74a-91a. The court rejected the FEC's interpretation of

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[1] To avoid any uncertainty about the Federal Election Commission's statutory authority to represent itself in this case in this Court, the Solicitor General has authorized the General Counsel of the Commission to file a petition in this case. This amicus brief is filed to express the government's views on the questions presented.

the statutory "commercial purposes" prohibition as "unreasonable," and held that, in light of the FECA's "overarching philosophy" favoring public disclosure of campaign contribution information (*id.* at 76a), the "commercial purposes" prohibition was inapplicable to respondent's activities. *Id.* at 90a-91a.

The district court thereafter denied respondent's request for attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). Pet. App. 14a-35a. Applying this Court's ruling in *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988), that "a position is 'substantially justified' if it has a 'reasonable basis both in law and fact' or if it 'could satisfy a reasonable person' " (Pet. App. 23a, quoting *Pierce* v. *Underwood*), the district court examined the entire record of the case and found that, even though the FEC's position was ultimately held to be incorrect, it was nevertheless "substantially justified." Pet. App. 24a-34a.[2]

The Second Circuit again reversed, with Judge Jacobs dissenting. Pet. App. 1a-13a. The majority held that the FEC's position could not be "substantially justified" because an earlier panel of the court of appeals had held that the agency's position was "unreasonable." *Id.* at 8a-9a. The court held that the merits decision "conclusively established that the [FEC's] position was not substantially justified so as to bar an award of attorney's fees." *Id.* at 9a. The court majority refused to apply an abuse of discretion standard of review to the lower court's decision. *Ibid.*

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[2] The district court also denied the fee application as untimely. Pet. App. 19a-22a. The court of appeals reversed that holding. *Id.* at 6a. The FEC's certiorari petition does not seek further review of the timeliness issue.

In so doing, the court expressly rejected five decisions from four other circuits holding that EAJA fee applications require the district court to undertake a separate inquiry into the justification for the government's position—an inquiry not governed by the prior decision on the merits. *Id.* at 8a.[3]

Judge Jacobs' dissent concluded (Pet. App. 10a-13a) that the district court had properly followed the substantial justification analysis mandated by *Pierce* v. *Underwood*, *supra*, and that its findings "easily withstand review" under the abuse-of-discretion standard required by that decision. Pet. App. 13a.

DISCUSSION

When federal administrative agency action is judicially challenged as inconsistent with the governing statute, courts ordinarily apply a highly deferential standard of review under which the agency's interpretation of the statute can be rejected only if it is unreasonable or arbitrary. The Second Circuit has held in this case that, when an agency's position on the merits is rejected in such a case as "unreasonable," that rejection "conclusively establishe[s]" that the agency's position was not "substantially justified" for purposes of a subsequent EAJA fee

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[3] The court of appeals refused to follow *FEC* v. *Rose*, 806 F.2d 1081 (D.C. Cir. 1986); *United States* v. *Paisley*, 957 F.2d 1161 (4th Cir.), cert denied, 113 S. Ct. 73 (1992); *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991); *Griffon* v. *HHS*, 832 F.2d 51 (5th Cir. 1987); and *Cinciarelli* v. *Reagan*, 729 F.2d 801 (D.C. Cir. 1984). Instead, the court relied on *Oregon Natural Resources Council* v. *Madigan*, 980 F.2d 1330 (9th Cir. 1992), which it read as holding that if the government's action has been held to be unreasonable on the merits, then it necessarily is not "substantially justified" under EAJA. Pet. App. 7a-8a.

application. This holding transforms EAJA into an automatic fee-shifting statute in such cases. In doing so, it expands the government's liability for attorney fees well beyond Congress's intent in enacting EAJA. The holding of the court below is also flatly inconsistent with this Court's decision in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and has been rejected by all other circuits that have considered the issue. We therefore agree with petitioner that summary reversal is appropriate. Alternatively, plenary review should be granted in order to resolve the existing circuit conflict.

1. The Equal Access to Justice Act, 28 U.S.C. 2412(d), is a waiver of sovereign immunity, rendering the federal government liable for attorney fees under specific conditions. See *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991). A central limitation on the EAJA waiver of the government's immunity to fee awards is that fees cannot be awarded if the government's position was "substantially justified." 28 U.S.C. 2412(d)(1)(A).

Because of the deferential standard of judicial review ordinarily applicable to federal agency statutory interpretations and policies,[4] almost all cases

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[4] See *Pierce*, 487 U.S. at 564-565 (equating "substantial evidence" review under the Administrative Procedure Act to a reasonableness standard); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984) (an agency's interpretation of a statute or regulation which it administers can only be rejected if a court finds it to be unreasonable or impermissible); 5 U.S.C. 706(2)(A) (providing that agency actions are to be reviewed to examine whether they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). See also *Griffon* v. *HHS*, 832 F.2d 51, 52 (5th Cir. 1987); *Evans* v. *Sullivan*, 928

where an agency does not prevail on the merits involve a judicial determination that the government's position was "unreasonable." Accordingly, if the Second Circuit's approach—that a merits finding that the government's action or interpretation was unreasonable "conclusively establishe[s] that the [government's] position was not substantially justified" (Pet. App. 9a)—is followed, EAJA fees will be required to be awarded almost every time an eligible party prevails against an agency's position, with the award being based solely on the fact that the agency position was not adopted.

In enacting EAJA, however, Congress expressly rejected a proposal providing for the automatic award of attorney fees to prevailing parties in agency litigation. As the 1980 House Committee Report explained (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 13-14 (1980)):

> Alternative standards were considered. For example, S. 2354, the predecessor to S. 265 in the 95th Congress, allowed for automatic awards to prevailing parties. This mandatory award was rejected because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts.[5]

F.2d 109, 111 (4th Cir. 1991); *Luciano Pisoni Fabbrica Acessori Instrumenti Musicali* v. *United States*, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988).

[5] The House Committee Report pertaining to the 1985 reenactment of EAJA (H.R. Rep. No. 120, 99th Cong., 1st Sess. 9-10 (1985)) states that "[a]gency action found to be arbitrary and capricious or unsupported by substantial evidence is

Cf. *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 139 (4th Cir. 1993) (EAJA "was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong").[6]

2. In *Pierce* v. *Underwood*, *supra*, this Court recognized that the disposition of the merits of a case does *not* control the inquiry into whether the government's position was "substantially justified"

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virtually certain not to have been substantially justified under the Act." However, this Court, in *Pierce* v. *Underwood*, 487 U.S. at 566-568, rejected the 1985 Report's definition of "substantial justification" (of which the above language is a part) as unpersuasive because it was subsequent legislative history, offered by the 1985 Congress as a definition of the terms used in the 1980 legislation and re-enacted without change in 1985. As the Court explained, the 1985 Report's definition "is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation." *Id.* at 566-567.

[6] The risk of this "chilling effect" is real. Unlike many other significant money judgments that are paid out of the non-agency specific judgment fund (see 28 U.S.C. 2414), an EAJA fee awarded under 28 U.S.C. 2412(d)(4) must be paid from the defendant-agency's own budget. Thus, the threat of a large fee award can easily serve as a deterrent to agency action in an unsettled area of the law, especially in times of tight fiscal constraints.

under EAJA.[7] *Pierce* recognizes that, by the time an EAJA petition is filed in the district court, the government has lost the case on the merits. 487 U.S. at 561. Nonetheless, *Pierce* holds that the district court must undertake a separate inquiry to determine whether, *before* the merits ruling, the government was substantially justified in believing the law to have to been to the contrary. *Ibid.*

In accordance with *Pierce*, the courts of appeals have, until the decision below, consistently recognized that the question whether the government's position was "substantially justified" under EAJA is legally distinct from the question of whether it was "reasonable" for purposes of the merits decision.[8]

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[7] This Court explained, "[c]onceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." 487 U.S. at 569. Moreover, "a position can be justified even though it is not correct, and * * * can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." *Id.* at 566 n.2.

[8] *Abernathy* v. *Clarke*, 857 F.2d 237, 239 (4th Cir. 1988) (arbitrary and capricious standard of review); *Sierra Club* v. *Secretary of Army*, 820 F.2d 513, 517-518 (1st Cir. 1987) (same); *FEC* v. *Rose*, 806 F.2d 1081, 1087-1090 (D.C. Cir. 1986) (same); *Spawn* v. *Western Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir.), petition for cert. pending, No. 93-471 (same); *Luciano Pisoni Fabbrica Acessori Instrumenti Musicali*, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988) (substantial evidence standard of review); *Welter* v. *Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991) (same); *Pullen* v. *Bowen*, 820 F.2d 105, 108 (4th Cir. 1987) (same); *Griffon* v. *HHS*, 832 F.2d 51, 52-53 (5th Cir. 1987) (*Chevron* standard of review). See *Andrew* v. *Bowen*, 837 F.2d 875, 878 (9th Cir. 1988) (in EAJA context, "arbitrary and capricious conduct is not per se unreasonable"); accord, *Kali* v. *Bowen*, 854 F.2d 329, 333 (9th Cir. 1988). See

This is not to say that the decision on the merits is irrelevant to the EAJA inquiry. Indeed, as several cases have recognized, analysis of the rationale of the merits decision can be a very useful indicator of the justification—or lack of justification—of the government's position. See, *e.g.*, *Oregon Natural Resources Council* v. *Madigan*, 980 F.2d 1330, 1332 (9th Cir. 1992)[9]; *Sierra Club* v. *Secretary of Army*, 820 F.2d 513, 517-518 (1st Cir. 1987); *United States* v. *Paisley*, 957 F.2d 1161, 1167 (4th Cir.), cert. denied, 113 S. Ct. 73 (1992). The merits decision, however, cannot itself be determinative of whether the government's position lacked substantial justification.

3. In *Pierce*, this Court expressly noted that the district court is in the best position to determine whether the government's position was "substan-

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also *United States* v. *Paisley*, 957 F.2d 1161, 1167 (4th Cir.) ("Although the impulse to equate ultimate judicial rejection of the government's merits position * * * with its lack of substantial justification is understandable, the courts perforce have rejected it as inappropriate, for to do so, 'would virtually eliminate the "substantially justified" standard from the statute.'") (quoting *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387, 1391-1392 (Fed. Cir. 1982)), cert. denied, 113 S. Ct. 73 (1992).

[9] The court below incorrectly read *Madigan* as authority for its automatic fee-shifting approach. Pet. App. 7a-8a. The Ninth Circuit in *Madigan* relied, not on the mere fact that the government had lost on the merits, but on the "holding *and rationale*" of the merits panel—in particular, its conclusion that the statutory language was clearly inconsistent with the government's position, and that the "analysis was neither complex nor extraordinary." 980 F.2d at 1332 (emphasis added). Cf. *Kali* v. *Bowen*, 854 F. 2d 329, 333 (9th Cir. 1988) (recognizing that merits loss on deferential review is not determinative of EAJA "substantial justification" issue).

tially justified" under EAJA. *Pierce*, 487 U.S. at 559-560. Accordingly, the Court concluded, that determination rests within the sound discretion of the district court, subject to review by the court of appeals only for an abuse of discretion. *Id.* at 563. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403-405 (1990). Applying this unambiguous holding, the courts of appeals heretofore have unanimously held that a district court's decision under EAJA on the question of whether the government's position was substantially justified is subject to review only for an abuse of discretion.[10] By vesting district courts with broad discretion over EAJA fee applications, the *Pierce* decision necessarily rejected the position, adopted by the court below in this case, that a loss on the merits "conclusively establishes" a right to fees.

In considering the fee application in this case, the district court carefully considered the rationale and the holding of the merits panel and concluded, in light of the entire record, that the government's position in this case had been substantially justified. Pet. App. 28a-34a. As Judge Jacobs observed (*id.* at 13a), the district court's findings in that regard "easily withstand review for abuse of discretion." The court of appeals' majority did not disagree with this con-

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[10] See *e.g.*, *Spawn*, 989 F.2d at 838-840; *Hanover Potato Products, Inc.* v. *Shalala*, 989 F.2d 123, 127-128 (3d Cir. 1993); *Paris* v. *HUD*, 988 F.2d 236, 238-239 (1st Cir. 1993); *Lundin* v. *Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992); *United States* v. *Paisley*, 957 F.2d at 1165-1170; *Stein* v. *Sullivan*, 966 F.2d 317, 319 (7th Cir. 1992); *Kali* v. *Bowen*, 854 F.2d 329, 331 (9th Cir. 1988). See also *Trahan* v. *Brady*, 907 F.2d 1215, 1217 (D.C. Cir. 1990) (discussing "the unqualified directive of *Pierce* to review EAJA decisions for abuse of discretion").

clusion. Instead, the majority ignored this Court's directive in *Pierce*,[11] and refused to apply the abuse-of-discretion standard in reviewing the district court's fee determination. That refusal was plain error.

In sum, the majority's analysis below is flatly inconsistent with the evident intent of Congress in enacting EAJA, with the teaching of *Pierce* v. *Underwood*, *supra*, and with the analysis of every other court of appeals that has considered the question.

CONCLUSION

The petition for certiorari should be granted and the decision below reversed, or, in the alternative, the case set for plenary review.

Respectfully submitted.

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JANUARY 1994

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[11] *Pierce* itself involved a situation in which several courts of appeals had rejected, as unreasonable, the agency's interpretation of its governing statute. See Pet. 15-16. This Court specifically rejected the argument that those rejections were determinative of the EAJA inquiry. *Pierce*, 487 U.S. at 569.